ARTICLE 3

CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

❖ Text of the provision*

1. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
   (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

   To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
   (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
   (b) taking of hostages;
   (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
   (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

   (2) The wounded and sick shall be collected and cared for.
2. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
3. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
4. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

* Paragraph numbers have been added for ease of reference.

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❖ Reservations or declarations
None[1]

Contents

[1] When signing the Geneva Conventions in 1949, Argentina entered the following reservation to common Article 3 (see United Nations *Treaty Series*, Vol. 75, p. 422):

> I shall, therefore, sign the four Conventions in the name of my Government and subject to ratification, with the reservation that Article 3, common to all four Conventions, shall be the only Article, to the exclusion of all others, which shall be applicable in the case of armed conflicts not of an international character.

However, the reservation was not formally confirmed upon Argentina's ratification of the Geneva Conventions in 1956; see United Nations *Treaty Series*, Vol. 251, pp. 372–375.

Portugal entered the following reservation upon signature of the four Geneva Conventions in 1949 (see United Nations *Treaty Series*, Vol. 75, p. 446):

> As there is no actual definition of what is meant by a conflict not of an international character, and as, in case this term is intended to refer solely to civil war, it is not clearly laid down at what moment an armed rebellion within a country should be considered as having become a civil war, Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law, in all territories subject to her sovereignty in any part of the world.

The reservation was withdrawn upon Portugal's ratification of the Geneva Conventions in 1961; see United Nations *Treaty Series*, Vol. 394, p. 258.

A. Introduction

385 Among the many important advances in international humanitarian law brought by the adoption of the 1949 Geneva Conventions, Article 3 stands out in particular. With its inclusion, States agreed for the first time on regulating, in an international treaty framework, what they described as 'armed conflict not of an international character'.[2] Common Article 3 represented one of the first provisions of international law that dealt with what was at

[2] Unless otherwise specified, armed conflicts as regulated by Article 3 will generally be referred to as 'non-international armed conflicts'; what that term comprises is discussed in section C.

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the time considered by States as being exclusively their domestic affair. The provision is common to the four Geneva Conventions.[3]

386 Subsequent decades have proven the importance of this article. While international armed conflicts still occur, the vast majority of recent armed conflicts have been non-international in character and have generated a level of suffering that is no less than that encountered in international armed conflicts.[4] Non-international armed conflicts may also take place, and have taken place, in part or in entirety, at sea or on other bodies of water. Within the framework of the Geneva Conventions, Article 3 applies to such conflicts.

387 Since 1949, the law of non-international armed conflict has developed considerably. States have adopted additional treaty law regulating non-international armed conflict, in particular Additional Protocol II of 1977 and a number of other instruments that apply in non-international armed conflicts.[5] In addition, the ICRC's study on customary international humanitarian law has identified a number of customary rules applicable in non-international armed conflict.[6]

388 Despite these developments, common Article 3 remains the core provision of humanitarian treaty law for the regulation of non-international armed conflicts. As part of the universally ratified 1949 Geneva Conventions, it is the only provision that is binding worldwide and governs all non-international armed conflicts. In comparison, Additional Protocol II is not universally ratified, and its scope of application is more limited, without, however, modifying common Article 3's existing conditions of application.[7]

[3] The text of 'common' Article 3 is identical in the four Geneva Conventions, except for in the Second Convention, which refers to the 'wounded, sick and shipwrecked' as opposed to just the 'wounded and sick' as referred to in the First, Third and Fourth Conventions.

[4] For various assessments from the perspective of international humanitarian law and other disciplines, see e.g. Stuart Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013*, Oxford University Press, 2014, pp. 26–32 and 35–233, and Lotta Themnér and Peter Wallensteen, 'Patterns of organized violence, 2002–11', *SIPRI Yearbook 2013*, Oxford University Press, 2013, pp. 41–60.

[5] See e.g. Hague Convention for the Protection of Cultural Property (1954), Article 19; Amended Protocol II to the Convention on Certain Conventional Weapons (1996), Article 1(3); Anti-Personnel Mine Ban Convention (1997); Second Protocol to the Hague Convention for the Protection of Cultural Property (1999), Article 22; Optional Protocol on the Involvement of Children in Armed Conflict (2000); Amendment to Article 1 of the 1980 Convention on Certain Conventional Weapons (2001) (extending the application of the Convention and its Protocols to non-international armed conflict); and Convention on Cluster Munitions (2008).

[6] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* and *Volume 2: Practice*, ICRC/Cambridge University Press, 2005, https://ihl-databases.icrc.org/customary-ihl/eng/docs/home. The study was prepared by the ICRC following Recommendation II of the 1995 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, which was endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995.

[7] For the current status of the Geneva Conventions and Additional Protocols, see https://www.icrc.org/ihl. For a comparison between the scope of application of common Article 3 and that of Additional Protocol II, see section C.2, as well as the commentaries on Articles 1 and 2 of Additional Protocol II.

389 Compared with the number and detail of the provisions governing international armed conflict in the Geneva Conventions, common Article 3 is brief and formulated in general terms.

390 The quality of common Article 3 as a 'Convention in miniature' for conflicts of a non-international character was already noted during the 1949 Diplomatic Conference.[8] Since then, the fundamental character of its provisions has been recognized as a 'minimum yardstick', binding in all armed conflicts, and as a reflection of 'elementary considerations of humanity'.[9]

B. Historical background

391 Non-international armed conflicts were not a new phenomenon when, in 1949, they were first regulated by common Article 3, as violence of either an international or a non-international character has long marred and formed human history.[10]

392 Nevertheless, the first Geneva Convention – the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field – dealt exclusively with armed conflict between States, more precisely with 'war',[11] as did its subsequent revisions and the treaties successively adopted on related issues of humanitarian concern.[12] This reflected the understanding that the initiation and waging of war was an exercise of sovereign power, a prerogative held by States, suitable for regulation by international law. In contrast, violence that was unsupported by such prerogative was regarded as unsuitable for such regulation.[13] Treating it as 'war' and subjecting it to international law would have unduly elevated the status of those exercising such violence.[14]

393 This does not mean, however, that before the adoption of common Article 3 in 1949 there was no awareness of the need to regulate certain aspects of

[8] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 326. At the time, this expression was used to point out the brevity and self-contained character of the draft ultimately adopted as common Article 3, in distinction to other approaches considered at the Diplomatic Conference that would have made certain provisions of the Geneva Conventions as such applicable in non-international armed conflicts. See also section B.

[9] See ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, paras 218–219.

[10] For a detailed discussion of situations of violence perceived as of an international or a non-international character over the centuries and across cultures, see Neff.

[11] For details of the notion of 'war' under international law, see the commentary on common Article 2, section D.

[12] See Hague Convention (III) (1899); Geneva Convention (1906); Hague Convention (X) (1907); Geneva Convention on the Wounded and Sick (1929); and Geneva Convention on Prisoners of War (1929). See also St Petersburg Declaration (1868) and Hague Regulations (1899) and (1907).

[13] See e.g. Moir, p. 3, and Sivakumaran, 2012, p. 9.

[14] See e.g. Milanovic/Hadzi-Vidanovic, pp. 261–262, and Sivakumaran, 2012, p. 9.

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violence involving non-State armed groups.[15] The 1928 Convention on Duties and Rights of States in the Event of Civil Strife, for example, stipulated rules for States Parties in the event of civil strife in another contracting State.[16] Furthermore, States experiencing internal armed violence occasionally entered into ad hoc agreements with non-State Parties,[17] or issued unilateral instructions to their armed forces, a notable example of which is the 1863 Lieber Code.[18]

394 In addition, in the course of the nineteenth century, the concept of the recognition of belligerency developed.[19] Acknowledging that some non-State Parties had the factual capability of waging 'war' of a scale that could affect the interests of third States, even though they lacked the legal capacity to do so,[20] the recognition of belligerency made it possible to apply certain rules of international law governing inter-State 'war' – namely the law of neutrality between belligerent and neutral States, and the laws and customs of war between belligerent States – in certain armed conflicts involving non-State Parties.[21] Provided that the armed conflict fulfilled certain conditions,[22] third States were therefore considered to be permitted (or even required according to some authors)[23] to recognize the non-State Party to the conflict as a 'belligerent', triggering the application of the law of neutrality.[24]

[15] See e.g. the work of Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Slatkine Reprints/Henry Dunant Institute, Geneva, 1983, Book III, chapter XVIII, paras 287–296 (calling for both sides in a civil war to observe the established laws of war to avoid civil wars escalating into barbarism).

[16] See also the two resolutions adopted by the Institut de Droit International at its session in Neuchâtel in 1900: Res. I, Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile; and Res. II, Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection.

[17] For examples, see Sivakumaran, 2012, pp. 25–28.

[18] The 1863 Lieber Code laid down the rules to be respected by the forces of the Union during the American Civil War.

[19] On this concept, see e.g. Milanovic/Hadzi-Vidanovic, pp. 263–264; Moir, pp. 4–18; and Sivakumaran, 2012, pp. 9–20.

[20] See e.g. Oppenheim, pp. 92–93.

[21] See Milanovic/Hadzi-Vidanovic, p. 262, with reference to Neff, p. 251, noting the desire to make neutrality law applicable as the decisive factor for the development of the concept of the recognition of belligerency.

[22] See e.g. Oppenheim, p. 93, para. 76:

> It is a customary rule of the Law of Nations that any State may recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war.

See also Institut de Droit International, Res. II, Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection, adopted at its Neuchâtel Session, 1900, Article 8. See, further, Lauterpacht, 1947, pp. 175–176, and 1952, pp. 249–250, with additional considerations.

[23] See Lauterpacht, 1947, pp. 175–176, and 1952, pp. 249–250. However, that was not a generally held view.

[24] See Oppenheim, p. 69, and Lauterpacht, 1952, p. 209. With respect to the State Party to the armed conflict, it was 'believed that the lawful Government is in any case entitled to assert

395 However, recognition of belligerency by third States had no legal consequence for relations between the Parties to the conflict. It neither brought the international laws and customs of war into effect between them, nor created a legal obligation for the State Party to the conflict to recognize its internal opponent as a belligerent.[25] The State Party to the conflict was free to recognize its opponent as a belligerent or not; only if it chose to do so did international law become applicable, making the conflict subject to the international laws and customs of war.[26] Once the conflict was over, however, the fact that it had recognized the insurgents as belligerents was not seen as preventing a victorious State Party from treating them as traitors and applying its criminal law to them, as the character of a belligerent Power gained through recognition was lost by the defeat.[27] In practice, with some exceptions,[28] States were reluctant to make use of the instrument of recognition of belligerency, disinclined as they were to admit to the existence within their borders of a situation justifying and requiring the application of international law and to raise the status of an internal opponent. Moreover, third States often did not want to affront other States by recognizing their internal opponents as belligerents and preferred not to subject themselves to the limitations of neutrality law.[29]

396 Initially, the ICRC was also hesitant to consider non-international armed conflicts a matter of international humanitarian concern.[30] However, in the light of experience on the ground, the need for and suitability of rules similar to

belligerent status and the resulting belligerent rights'; see Lauterpacht, 1952, p. 249, fn. 4, with further references.

[25] See e.g. Oppenheim, pp. 69 and 366. See also Lauterpacht, 1947, pp. 246–247, with further considerations, and 1952, pp. 251 and 209–210.

[26] In addition, the State Party to the armed conflict became bound to respect the law of neutrality vis-à-vis third States, whereas third States were not bound by the law of neutrality in consequence of the State Party's recognition of the non-State Party as belligerent, nor were third States obligated to recognize the non-State Party as belligerent because the State Party had done so; see e.g. Oppenheim, pp. 69 and 366, and Lauterpacht, 1947, pp. 246–247, with further considerations. See also Sivakumaran, 2012, pp. 15–16, with further references.

[27] See Oppenheim, pp. 69–70, and Milanovic/Hadzi-Vidanovic, p. 264. See also Lieber Code (1863), Article 154: 'Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.'

[28] An example often discussed is the recognition of the Confederation as belligerent during the American Civil War; see Milanovic/Hadzi-Vidanovic, p. 264, and Sivakumaran, 2012, pp. 17–19.

[29] See Milanovic/Hadzi-Vidanovic, p. 264, and Duculesco, p. 126.

[30] The minutes of the second meeting of the ICRC's founding body on 17 March 1863, the subcommittee established by the Geneva Public Welfare Society to study the implementation of the suggestions made by Henry Dunant in his book, *A Memory of Solferino*, noted:

> The Committee agreed, first and foremost, that, in its opinion, no action should be contemplated during civil wars, and that the Committees should concern themselves only with European wars. After a few years' experience, the welfare scheme, once universally adopted and established, could of course be extended in various ways, but for the moment we should confine ourselves to the question of large-scale conflicts between European Powers.

Reproduced in *Revue internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, Supplement, Vol. II, No. 3, March 1949, p. 130.

those laid down in the 1864 Geneva Convention in situations of non-international armed conflict became evident to the ICRC.[31] In 1912, two reports by individual National Red Cross Societies addressing the role of the Red Cross in situations of 'civil war' and 'insurrection' were presented to the 9th International Conference of the Red Cross,[32] but strong resistance from States prevented them from being opened to detailed discussion and vote.[33]

397 At the 10th International Conference of the Red Cross in 1921, however, a resolution was adopted addressing humanitarian concerns, *inter alia*, during situations of 'civil war'.[34] While not a binding instrument, the resolution affirmed the right and duty of the Red Cross to afford relief in case of civil war and social and revolutionary disturbances. It recognized that all victims of civil war or of such disturbances are, without any exception whatsoever, entitled to relief, in conformity with the general principles of the Red Cross.[35]

398 The important step taken in the 1921 resolution was reaffirmed in 1938 when, during the Spanish Civil War, the 16th International Conference of the Red Cross adopted a further resolution requesting the ICRC, 'making use of its practical experience, to continue the general study of the problems raised by civil war as regards the Red Cross, and to submit the result of its study to the next International Red Cross Conference'.[36]

399 The Second World War prevented the International Conference of the Red Cross from taking place as planned in 1942. After the end of the war and against the background of the experiences of the Spanish Civil War and the Greek Civil War, the ICRC gave renewed thought to the humanitarian issues arising in non-international armed conflict as part of its work on a revision of the 1929 Geneva Conventions and the 1907 Hague Convention (X) and on the drafting of a new convention relating to the protection of civilian persons in time of war.

400 In 1946, the ICRC convened a 'Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various Problems

[31] See Moynier, p. 304, and Ador/Moynier, pp. 168–169.

[32] The American Red Cross submitted a report on 'Le rôle de la Croix-Rouge en cas de guerre civile ou d'insurrection', and the Cuban Red Cross on 'Mesures à prendre par la Croix-Rouge dans un pays en état d'insurrection permettant à cette institution d'accomplir ses fonctions entre les deux belligérants sans manquer à la neutralité'; see American Red Cross, *Neuvième Conférence Internationale de la Croix-Rouge tenue à Washington du 7 au 17 Mai 1912, Compte Rendu*, Washington, D.C., 1912, pp. 45–49.

[33] See *ibid.* pp. 45 and 199–208. For example, one State delegation noted that each direct or indirect offer of services of Red Cross Societies to 'insurgents or revolutionaries' could only be seen as an 'unfriendly act'.

[34] 10th International Conference of the Red Cross, Geneva, 1921, Res. XIV, Guerre Civile, reproduced in *Dixième conférence internationale de la Croix-Rouge tenue à Genève du 30 mars au 7 avril 1921. Compte rendu*, Imprimerie Albert Renaud, Geneva, 1921, pp. 217–218.

[35] *Ibid.* section entitled 'Résolutions', paras 4–6.

[36] 16th International Conference of the Red Cross, London, 1938, Res. XIV, Role and Activity of the Red Cross in Time of Civil War, reproduced in *Sixteenth International Red Cross Conference, London, June 1938, Report*, p. 104.

relative to the Red Cross'. With respect to a revision of the 1929 Geneva Convention on the Wounded and Sick, the ICRC proposed that 'in case of Civil War within the frontiers of a State the adversaries should be invited to declare their readiness to apply the principles of the Convention, subject to reciprocity being observed'.[37]

401 The Preliminary Conference chose a more direct approach by replacing the condition of reciprocal application contained in the ICRC draft by an assumption of application. It suggested inserting at the beginning of the Convention an article defining its scope of application which included the following paragraph:

> In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary.[38]

402 The Preliminary Conference was guided by the consideration that 'no State or insurgent body would venture to proclaim, in the face of world opinion, its intention of disregarding the laws of humanity, whose value and essential character are universally recognized'.[39] As regards the 1929 Geneva Convention on Prisoners of War, the Preliminary Conference considered that 'the provisions embodied in the Convention … must be applied … , in principle, in case of civil war'.[40]

403 These proposals were discussed at the 1947 Conference of Government Experts. With respect to the revision of the 1929 Geneva Conventions and the drafting of a new civilians convention, the participants agreed on a provision that again included a condition of reciprocal application:

> In case of civil war, in any part of the home or colonial territory of a Contracting Party, the principles of the Convention shall be equally applied by the said Party, subject to the adverse Party also conforming thereto.[41]

[37] *Report of the Preliminary Conference of National Societies of 1946*, p. 15.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.* p. 70. Furthermore, with respect to specific Red Cross problems, the Preliminary Conference 'desire[d] to see embodied in the Convention … the following activities: … in case of civil war, the Red Cross shall be authorized to extend its care to all wounded, without distinction of the party to which they may belong'; *ibid.* p. 105.
[41] *Report of the Conference of Government Experts of 1947*, p. 8 (text adopted for the revision of the convention on the wounded and sick). The paragraph had slightly differing, but substantively identical, wording for the revision of the prisoner-of-war convention and the new convention on the protection of civilians; see also *ibid.* pp. 103 and 271. The reinsertion of the formulation 'principles of the Convention' (contained in the 1946 ICRC proposal but replaced by 'the Convention' in the text adopted by the 1946 Preliminary Conference) followed the suggestion of one delegation; see *Minutes of the Conference of Government Experts of 1947*, Committee I, Vol. II, 1st meeting, pp. 5–6. Insofar as the text adopted by the Conference of Government Experts reverts to the term 'civil war' (whereas the 1946 Preliminary Conference had adopted the term 'armed conflict'), see *Report of the Conference of Government Experts of 1947*, pp. 9 and 270.

404 In preparation for the 17th International Conference of the Red Cross in Stockholm in 1948, the ICRC subsequently drew up the following wording for a draft article 2(4) to be inserted in each of the future revised or new conventions:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.[42]

405 The exclusion of the condition of reciprocal application in the ICRC's draft was based on its consideration that it might 'render this stipulation valueless, as one Party could always allege that its adversary disregarded some specific clause of the Convention'. The explicit clarifications regarding the legal status of the Parties to the conflict took up on a recommendation made by a delegation during the 1947 Conference of Government Experts.[43]

406 On that basis, the Stockholm Conference adopted the following draft article 2(4) for the revision of the 1929 Geneva Convention on the Wounded and Sick and of the 1907 Hague Convention (X):

> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Conventions. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.[44]

407 With respect to the revision of the 1929 Geneva Convention on Prisoners of War and to a new convention on the protection of civilians, the Stockholm Conference included the condition of reciprocal application:

> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, subject to the adverse party likewise acting in obedience thereto. The Convention

[42] *Draft Conventions submitted to the 1948 Stockholm Conference*, pp. 5, 34–35, 52, 153 and 222.
[43] *Ibid.* p. 6.
[44] See *Draft Conventions adopted by the 1948 Stockholm Conference*, pp. 10 and 32. The change from 'principles of the present Convention' to 'provisions of the present Convention' represented a harmonization of the English and French texts. The original French text of the ICRC proposal submitted to the Stockholm Conference had used the term 'dispositions de la présente Convention', which had been incorrectly translated as 'principles'. See *Minutes of the Legal Commission at the 1948 Stockholm Conference*, p. 46.

shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.[45]

The inclusion of a condition of reciprocal application in the draft conventions on prisoners of war and civilians resulted from the prevailing view that, while the humanitarian character of the conventions on the wounded, sick and shipwrecked supported an application of their provisions in non-international armed conflicts even without reciprocity, the same was not true for all of the provisions of the prisoner-of-war and new civilians conventions, such as, in particular, the provisions on Protecting Powers.[46] The deletion of the examples of armed conflicts not of an international character contained in the ICRC draft ('especially cases of civil war, colonial conflicts, or wars of religion') was ultimately guided by the view that too much detail risked weakening the provision because it was impossible to foresee all future circumstances and because the armed conflict character of a situation was independent of its motives.[47]

408 In early 1949, in preparation for the Diplomatic Conference to be held in Geneva later that year, the ICRC circulated to States a number of comments and suggestions on the draft conventions. With respect to Article 2(4) of the draft revised 1929 Geneva Convention on Prisoners of War and the draft new civilians convention, the ICRC underlined its belief that 'it would be preferable to delete the words "subject to the adverse party likewise acting in obedience thereto"' also in these conventions.[48]

409 During the Diplomatic Conference, as had already become apparent during the debates leading up to it, the regulation of 'armed conflicts not of an international character' proved to be one of the most difficult issues on the table.

410 States' divergent positions became evident during the first reading of draft article 2 in the Joint Committee.[49] While some disapproved of the inclusion of

[45] See *ibid.* pp. 51–52 and 114 (emphasis omitted).

[46] See *Minutes of the Legal Commission at the 1948 Stockholm Conference*, pp. 48–57 and 64. For a summary of all of the arguments of delegations in favour of including the condition of reciprocal application in these Conventions, see *ICRC Remarks and Proposals on the 1948 Stockholm Draft*, pp. 37–38.

[47] See *Minutes of the Legal Commission at the 1948 Stockholm Conference*, pp. 36–45 and 64.

[48] See *ICRC Remarks and Proposals on the 1948 Stockholm Draft*, pp. 36–38 and 68, *inter alia*, noting at 38:

> The ICRC wish to stress, as they have so far done in their comments on the Draft Conventions, and as one National Red Cross Society has recently remarked, that if the reciprocity clause is inserted in this Paragraph, the application of the Convention in the event of civil war may be completely stultified. One of the parties to the conflict could always assert, as would be all too easy in a war of this nature, that the adversary was not observing such and such a provision of the Convention.

[49] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 9–15. The Joint Committee united the three committees established by the Conference to discuss, respectively: the draft wounded and sick and draft maritime conventions; the draft prisoner-of-war

any provision governing non-international armed conflicts in the new Conventions, others were in favour of regulating all non-international armed conflicts. Some agreed that there should be some regulation but preferred to limit such regulation to strictly defined situations.[50]

411 A Special Committee was formed and tasked with finding a compromise formula. After agreeing on the fundamental question that non-international armed conflicts should be addressed in the new conventions in one way or another, the Special Committee focused its work on the following two options:

1. Applying the entire Conventions to specific cases of non-international armed conflict only; or
2. Applying only certain provisions of the Conventions to all non-international armed conflicts.[51]

412 To study these options, the Special Committee set up a 'Working Party'.[52] The first draft proposed by the Working Party foresaw the application of the whole of the Conventions to non-international armed conflict, with the exception of the provisions on Protecting Powers, in strictly defined circumstances; lacking those, only the 'underlying humanitarian principles' of the Conventions would be generally applicable.[53] However, this proposal did not find favour with either the supporters or the opponents of the regulation of non-international armed conflict.[54]

413 Based on the feedback received, the Working Party submitted a second draft, with separate versions for, on the one hand, the revisions of the two 1929 Geneva Conventions and the 1907 Hague Convention (X)[55] and, on the other hand, the new convention for the protection of civilian persons in time of armed conflict.[56]

414 These drafts again prompted several proposals for amendments,[57] among them one by the French delegation that abandoned the approach of a full

convention; and the draft new civilians convention. The Joint Committee was tasked with the discussion of the articles common to these drafts.

[50] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 16 and 26.

[51] See *ibid.* p. 122, further noting that '[t]hese two ways did not exclude each other, and the possibility of solving the problem in different ways in the four Conventions increased the number of solutions to be envisaged'. See also, subsequently, p. 76.

[52] See *ibid.* pp. 45 and 122.

[53] See *ibid.* pp. 46–47 and 124, Annex A.

[54] See *ibid.* pp. 47–50. The ICRC representative noted, among other things, with respect to the draft, that '[i]n his view, the text drawn up by the Working Party could never have been applied in any recent case of civil war. It therefore did not represent a progress with regard to the present situation' (*ibid.* pp. 47–48).

[55] See *ibid.* pp. 76–77 and 125, Annex B.

[56] See *ibid.* pp. 76–77 and 125, Annex C.

[57] See *ibid.* pp. 77–79 and 122–123. The seventh report of the Special Committee to the Joint Committee summarized delegations' responses to the second draft text as follows:

> The main objections to the second Draft of the Working Party were that the sub-division of non-international conflicts into two categories would raise interminable discussions at the

application of the Conventions in strictly circumscribed situations of non-international armed conflict, with other non-international armed conflicts generally subject only to the 'underlying humanitarian principles' of the Conventions. Instead, the French draft, referring to the provisions of the draft preamble to the civilians convention,[58] pointed to a limited, but distinct set of humanitarian norms to be applied in all situations of non-international armed conflict.[59]

415 On that basis, a second Working Party was set up to study the French proposal,[60] reporting back to the Special Committee with a draft text for inclusion in all four Conventions which laid the ground for the text finally adopted.[61]

416 While voting took place on a considerable number of proposals for amendments during its meeting,[62] the Special Committee succeeded in referring a text to the Joint Committee that almost completely foreshadowed the wording that would ultimately be adopted as common Article 3.[63] Further drafts were considered by the Joint Committee, including one submitted by the USSR delegation which called for the application of the provisions of the Geneva Conventions, insofar as they served a fundamentally humanitarian purpose, in all non-international armed conflicts.[64] In the end, the text that had been referred to the Joint Committee by the Special Committee found a majority of votes and was ultimately adopted as a new draft article 2A and submitted to the Plenary Assembly.[65]

417 In the final vote in the Plenary Assembly, draft article 2A was adopted by 34 votes to 12, with 1 abstention.[66] In the sequence of articles altogether

> beginning of each civil, colonial, or other war as to whether it belonged to one or the other category; no juri[s]diction had been provided for to determine whether the conditions for full application of the Conventions had been met in a specific case; that in reality such a decision was left to the discretion of the *de jure* government; and that the conditions in question would very seldom be fulfilled. [*Ibid.* p. 123]

[58] An option also suggested by the Italian delegation during the early discussions in the Joint Committee and in the Special Committee before the setting up of the first Working Group; see *ibid.* pp. 13 and 40.

[59] For the text of the French proposal, see *ibid.* p. 123. The draft preamble to which the French proposal referred had first been developed for the draft civilians convention by the 1948 Stockholm Conference; see *Draft Conventions adopted by the 1948 Stockholm Conference*, p. 113. The ICRC had subsequently proposed a similar preamble text for inclusion in all four Conventions; see *ICRC Remarks and Proposals on the 1948 Stockholm Draft*, pp. 8, 26, 36 and 67 (with an additional alternative text for the civilians convention). Ultimately, the Diplomatic Conference decided not to adopt substantive preambles for the four Geneva Conventions; however, the essence of the draft preambles found its entry in common Article 3. For details, see the commentary on the Preamble, section B.

[60] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 79.

[61] See *ibid.* pp. 82–83 and 125–126.

[62] See *ibid.* pp. 83–84, 90, 91 and 93–95.

[63] See *ibid.* pp. 101 and 126, Annex E.

[64] See *ibid.* pp. 97–98 and 127.

[65] See *ibid.* pp. 34–35 and 36–37.

[66] See *ibid.* p. 339.

adopted, draft article 2A was given its ultimate position as Article 3 common to the four Geneva Conventions.[67]

C. Paragraph 1: Scope of application of common Article 3

1. Introduction

418 Common Article 3 does not provide a detailed definition of its scope of application, nor does it contain a list of criteria for identifying the situations in which it is meant to apply. It merely stipulates that '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', certain provisions must be respected by the Parties to the conflict.

419 The ostensible simplicity of its formulation is the result of common Article 3's negotiating history.[68] Positions at the 1949 Diplomatic Conference ranged from opposition to any limitation being imposed by international law on States' right to respond to armed violence within their sovereign spheres to a strong resolve to subject non-international armed conflicts to the regime of the Geneva Conventions to the greatest extent possible. A compromise had to be found. Faced with a choice between limiting the situations regulated to a circumscribed subset of non-international armed conflicts and restricting the number of rules binding in non-international armed conflicts while ensuring that they would be applicable to a broad range of situations, States ultimately chose the latter, while leaving the door open for special agreements to be concluded allowing for the application of more of the Conventions' rules.[69]

420 Nonetheless, the wording agreed upon does not resolve the persistent question of the scope of application of common Article 3. The intentional lack of detail on this point may have facilitated States' adoption of common Article 3. However, clarity as to its scope of application is important, as whether or not a given situation is an 'armed conflict not of an international character' entails significant consequences. In this respect, it is useful to note that the qualification of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' in Article 1 of Additional Protocol II as 'not being armed conflicts' is also considered accurate for common Article 3.[70]

[67] See *ibid.* Vol. I, pp. 383–385.
[68] For details, see section B.
[69] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 122–123; see also pp. 46–50, 76–79 and 122–125.
[70] See Bothe/Partsch/Solf, p. 719, noting for Article 1(2) of Additional Protocol II that the 'passage ["as not being armed conflicts"] should not be interpreted as an attempt to change the sense of common Art. 3, whose "existing conditions of application" are not modified by Art. 1 of Protocol II'.

421 A situation of violence that crosses the threshold of an 'armed conflict not of an international character' is a situation in which organized Parties confront one another with violence of a certain degree of intensity. It is a determination made based on the facts.

422 If a situation of violence amounts to a non-international armed conflict, the applicability of common Article 3 and other provisions of humanitarian law applicable in non-international armed conflict ensures that the Parties to that conflict are under an international legal obligation to grant certain fundamental protections to the victims of the conflict and to respect the rules on the conduct of hostilities.[71] Importantly, humanitarian law binds all Parties to the conflict, State and non-State alike.[72] The application of common Article 3 and other provisions of humanitarian law developed precisely to address the realities of non-international armed conflict can therefore make a vital difference to the survival, well-being and dignity of the victims of a conflict.

423 While common Article 3 contains rules that serve to limit or prohibit harm in non-international armed conflict, it does not in itself provide rules governing the conduct of hostilities. However, when common Article 3 is applicable, it is understood that other rules of humanitarian law of non-international armed conflict, including those regarding the conduct of hostilities, also apply. Thus, while there may be no apparent need to discern possible limits to the scope of application of common Article 3, it is important that the rules applicable in armed conflicts apply only in the situations for which they were created.[73]

424 The existence of a situation that has crossed the threshold of an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' must therefore be neither lightly asserted nor denied. Humanitarian law standards must be applied only in the situation – armed conflict – for which they were intended and developed, carefully balancing considerations of military necessity and humanity.

425 Apart from the question whether a situation of violence has crossed the threshold of a non-international armed conflict, the assessment of the scope of application of common Article 3 serves a further purpose: it confirms the distinction between international and non-international armed conflict. There are still important elements of humanitarian law governing international armed conflicts that have no counterpart in the law applicable to non-international armed conflicts, despite the considerable development of conventional and customary international humanitarian law applicable to

[71] In addition to common Article 3, other humanitarian law treaties may also become applicable in a non-international armed conflict, in particular Additional Protocol II. For details, see the commentary on Article 1 of Additional Protocol II and section C.2 of this commentary. Furthermore, rules of customary international law applicable to non-international armed conflict will need to be respected; for an assessment, see Henckaerts/Doswald-Beck.

[72] For details on the binding force of common Article 3, see section D.1.

[73] For details on the geographic and temporal scope of application of common Article 3, see sections C.3 and C.4.

non-international armed conflicts since 1949. In particular, humanitarian law governing non-international armed conflicts does not provide for prisoner-of-war status and contains no equivalent to the occupation law regime. The distinction between international and non-international armed conflict is therefore of continuing relevance.

426 It should be noted that there is no central authority under international law to identify or classify a situation as an armed conflict. States and Parties to a conflict need to determine the legal framework applicable to the conduct of their military operations. For its part, the ICRC makes an independent determination of the facts and systematically classifies situations for the purposes of its work. It is a task inherent in the role that the ICRC is expected to exercise under the Geneva Conventions, as set forth in the Statutes of the International Red Cross and Red Crescent Movement.[74] Other actors such as the United Nations and regional organizations may also need to classify situations for their work, and international and national courts and tribunals need to do so for the purposes of exercising their jurisdiction. In all cases, the classification must be made in good faith, based on the facts and the relevant criteria under humanitarian law.[75]

2. 'In the case of armed conflict not of an international character'

a. The Parties to a non-international armed conflict

i. General

427 Common Article 3 is based on a negative description: it is applicable in the case of armed conflicts 'not of an international character'. Armed conflicts 'not of an international character' are armed conflicts where at least one Party is not a State. This reading is supported by the context of common Article 3: it comes after common Article 2, which applies to armed conflicts between States, i.e. international armed conflicts. The field of application of common Article 3 distinguishes itself from inter-State armed conflicts covered by common Article 2.[76] Accordingly, armed conflicts not of an international character are

[74] Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5.

[75] As international law is a self-applied system, it is possible that different actors can have different views of the same facts. In any case, it is the facts that determine whether a situation constitutes an international armed conflict, a non-international armed conflict or is not an armed conflict at all.

[76] See e.g. Australia, *Manual of the Law of Armed Conflict*, 2006, para. 3.8: 'A non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other; the parties to the conflict are not sovereign states, but the Government of a single state in conflict with one or more armed forces within its territory.' See also United States, Supreme Court, *Hamdan case*, Judgment, 2006, p. 67: 'The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application."' But see Israel, Supreme Court, *Public Committee against Torture in Israel case*, Judgment, 2006, para. 18, defining armed conflicts of an international character as

first of all armed conflicts which oppose the government of a State Party and one or more non-State Parties.[77] This was the type of non-international armed conflict that dominated discussions during the negotiation of common Article 3.[78]

428 In addition, it is widely accepted that non-international armed conflicts in the sense of common Article 3 also comprise armed conflicts in which no State Party is involved, i.e. armed conflicts exclusively opposing non-State armed groups.[79] It should be noted, however, that Additional Protocol II does not apply to such conflicts.[80] However, this does not modify the scope of application of common Article 3.[81] With the adoption of the ICC Statute in 1998, States reaffirmed that they considered that fighting which occurs only between different armed groups and not involving a State can also amount to a non-international armed conflict.[82]

ii. Specific cases

429 The understanding that non-international armed conflicts in the sense of common Article 3 are armed conflicts involving opponents of which at least one is not a State will usually allow an easy distinction between international and non-international armed conflict. However, situations may arise where this is less obvious.

follows: 'This law [international law regarding international armed conflict] applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state.'

77 See e.g. ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. See also Gasser, p. 555.

78 For details, see section B.

79 See e.g. ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. See also Gasser, p. 555: 'Another case [of non-international armed conflict] is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power.'

80 According to Article 1(1) of Additional Protocol II, the Protocol applies to armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups'; for details, see the commentary on that article.

81 According to Article 1(1) of Additional Protocol II, the Protocol 'develops and supplements' common Article 3 'without modifying its existing conditions of application'. For the same reason, the requirement in Article 1(1) of Additional Protocol II that the non-State Party to the conflict exercise territorial control only applies to Additional Protocol II and not to common Article 3. For common Article 3, territorial control may be one factual indicator that the organization of a non-State armed group has reached the level of a Party to a non-international armed conflict, but it is not an independent precondition of its applicability; for details, see section C.2.b.

82 Article 8(2)(d) of the 1998 ICC Statute, determining the scope of application of Article 8(2)(c), does not introduce a limitation to non-international armed conflicts involving at least one State, even though it otherwise makes use of notions developed in Additional Protocol II. Furthermore, according to Article 8(2)(f) of the Statute, Article 8(2)(e) explicitly applies to 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.

430 International humanitarian treaty law itself addresses certain cases. According to Article 1(4) of Additional Protocol I, international armed conflicts in the sense of common Article 2 of the Geneva Conventions also

> include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

431 For States party to the Protocol, humanitarian law governing international armed conflicts thus applies to such conflicts.[83]

432 Situations in which the international or non-international character of an armed conflict may not be obvious are those in which a State is engaged in a conflict against an entity whose statehood is uncertain. Depending on whether that entity is a State, the conflict will be international or non-international, making either the law of international or non-international armed conflict applicable.[84] Common Article 3 or humanitarian law more generally does not give an answer on whether an entity is a State under international law; it is the rules of general international law that set out the relevant criteria.[85] The question whether and when opponents were States arose, for example, during the conflicts in the former Yugoslavia in the early 1990s leading to the independence of Croatia and Bosnia and Herzegovina.[86] This and other situations have also served to illustrate that an armed conflict can change from a non-international to an international armed conflict, and vice versa.

433 Furthermore, when a State is party to a conflict against an entity which may or may not be the *government* of another State, it may also be unclear whether the conflict is of an international or a non-international character. Unlike in the situation above, here it is not the statehood that is uncertain. The question is rather whether or not the first State's opponent is the government of that

[83] See Additional Protocol I, Article 96(3). For details, see the commentaries on Articles 1(4) and 96 of Additional Protocol I.

[84] Provided, in the latter case, that the non-international armed conflict threshold has been reached; for details, see section C.2.b.

[85] On statehood under international law, see e.g. James R. Crawford, 'State', version of January 2011, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, http://www.mpepil.com, as well as, for a detailed analysis, James R. Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press, 2006. The general, 'classical' criteria for statehood, based on effectiveness, were formulated in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States: 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.' See also the commentary on common Article 2, para. 264. For the role of the depositary in this respect, see the commentaries on Article 139, section C.1, and on Article 141, section C.2.

[86] ICTY, *Slobodan Milošević* Decision on Motion for Judgment of Acquittal, 2004, paras 87–115; *Delalić* Trial Judgment, 1998, paras 96–108 and 211–214; *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 72.

second State. Humanitarian law does not provide guidance in deciding whether an entity is the government of a State; instead, this assessment is made according to the rules of general international law. Under international law, the key condition for the existence of a government is its effectiveness, that is, its ability to exercise effectively the functions usually assigned to a government within the confines of a State's territory, including the maintenance of law and order.[87] Put another way, effectiveness is the ability to exercise State functions both internally and externally, i.e. in relation to other States. If the entity in question is the government, the armed conflict is international, opposing two States, represented by their respective governments. If it is not the government, the conflict is non-international, provided, of course, that the threshold for non-international armed conflict has been reached.[88]

434 This question arose, for example, in connection with the military operation in Afghanistan launched by the US-led coalition of NATO States in October 2001. Based on the above considerations, the ICRC classified the initial phase as an international armed conflict between the US-led coalition and the Taliban regime in Afghanistan, which controlled at the time almost 90 per cent of the Afghan territory. Following the establishment of a new Afghan Government in June 2002 through a *loya jirga* (grand assembly), the ICRC reclassified the situation as a non-international armed conflict between, on the one hand, the new Afghan Government supported by the coalition States and, on the other hand, the Taliban and other non-State armed groups.[89]

435 Some States involved classified the conflict differently, however, ranging from an international armed conflict initially,[90] to a stability operation, possibly including a peacekeeping mission, that may not always have been recognized as an armed conflict (be it international or non-international).[91]

[87] See Hersch Lauterpacht, 'Recognition of Governments: I', *Columbia Law Review*, Vol. 45, 1945, pp. 815–864, especially at 825–830, and Malcolm N. Shaw, *International Law*, 8th edition, Cambridge University Press, 2017, pp. 336–340. See also Siegfried Magiera, 'Governments', version of September 2007, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, http://www.mpepil.com, paras 14 and 17. See also Article 4A(3) of the Third Convention, from which it can be inferred that the non-recognition by a Detaining Power of a government or authority does not influence the international character of an armed conflict; for details, see the commentary on that article.

[88] And provided that the entity does not belong to another State. See section C.2.b for details on the threshold of non-international armed conflict.

[89] See e.g. ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2007, p. 7, and *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 10.

[90] United States, Memorandum on Humane Treatment of Taliban and al Qaeda Detainees, The White House, Washington, D.C., 7 February 2002, classifying the conflict as an international armed conflict.

[91] Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, pp. 33–36. See also Nina M. Serafino, *Peacekeeping and Related Stability Operations: Issues of U.S. Military Involvement*, Congressional Research Service Report, updated 24 January 2007; Constantine D. Mortopoulos, 'Note: Could ISAF be a PSO? Theoretical Extensions, Practical Problematic and the Notion of Neutrality', *Journal of Conflict and Security Law*, 2010, Vol. 15, No. 3, pp. 573–587; and Françoise J. Hampson,

iii. Involvement of one or more foreign States in a non-international armed conflict

436 The classification of an armed conflict as international or non-international can also be complicated when one or more foreign States joins a non-international armed conflict. A foreign State might join a conflict and fight on the governmental side of the State party to the conflict or on the side of the non-State armed group. In the case of the involvement of several foreign States, it is also conceivable that one or more would fight in support of the government, while one or more others would fight in support of the non-State armed group.

437 In view of the potential complexity of such scenarios, it has been suggested that any military involvement (i.e. fighting in support of a Party) by a foreign State in a non-international armed conflict internationalizes the conflict as a whole, making humanitarian law governing international armed conflict applicable in relations between all the opposing Parties.[92] Such an approach was also suggested by the ICRC to the 1971 Conference of Government Experts, but was rejected.[93]

438 Instead, a differentiated approach has become widely accepted, distinguishing between whether an outside State fights in support of the State Party to the conflict or in support of the armed group.[94] In the first case, the armed conflict will retain its non-international character, because it continues to oppose a non-State armed group and the State authorities. In the second case, the original armed conflict between the non-State armed group and the State Party also remains non-international in character (unless the intervening State exercises a certain degree of control over the armed group).[95] At the same

'Afghanistan 2001–2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 242–279.

[92] See e.g. UN Security Council, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/25274, 10 February 1993, Annex 1, para. 45, suggesting the application of humanitarian law governing international armed conflict to 'the entirety of the armed conflicts in the territory of the former Yugoslavia'. See also David, p. 178: 'En résumé, le principe du fractionnement du conflit est théoriquement admissible mais difficile à mettre en pratique et parfois susceptible de mener à des incohérences. Nous sommes donc favorable à l'internationalisation générale du conflit en cas d'intervention étrangère.' ('In sum, it is theoretically possible to split the conflict [into internal and international components], but it would be difficult to put into practice and may lead to inconsistencies. Thus, in the case of foreign intervention, it is preferable to deem it a general internationalization of the conflict.')

[93] The proposal read: 'When, in case of non-international armed conflict, one or the other Party, or both, benefits from the assistance of operational armed forces afforded by a third State, the Parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts'; *Report of the Conference of Government Experts of 1971*, Vol. V, p. 21. Among the reasons noted by the experts to reject the proposal was that it would encourage non-international armed groups to seek support from foreign States; see *ibid.* pp. 51–52.

[94] The differentiated approach has been implicitly reaffirmed by the ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 219. See also Akande, pp. 57 and 62–64; Schindler, p. 150; and San Remo Manual on the Law of Non-International Armed Conflict (2006), commentary on section 1.1.1.

[95] See paras 440–444 of this commentary.

time, in the second case a parallel international armed conflict between the intervening foreign State and the State party to the original armed conflict also arises, because in that instance two States are opposed. Lastly, where several foreign States intervene on either side of the original non-international armed conflict, the international or non-international character of each bilateral conflict relationship will depend on whether the opposing Parties only consist of States or involve non-State armed groups. This approach is today also followed by the ICRC.[96]

439 While legally precise, it has been pointed out that the differentiated approach is sometimes not easily applied in practice.[97] For example, in the scenario of parallel non-international and international armed conflicts arising following the intervention of a foreign State in support of the non-State armed group that is party to the original armed conflict, different legal regimes apply to persons deprived of their liberty by either the non-State armed group or the intervening State. Depending on the status of those persons, the intervening State is under the obligation to treat them in line with the Third or Fourth Geneva Convention,[98] whereas the non-State armed group is bound only by the law governing non-international armed conflict.

iv. Control by an intervening foreign State over a non-State armed group that is party to the conflict

440 A particular case occurs when a foreign State not only joins but in fact controls a non-State armed group in its armed conflict against a State's armed forces. In such a situation, there will not be parallel non-international and international armed conflicts, but only an international armed conflict between the intervening State and the territorial State, even though one of them is acting through a non-State armed group. The level of control by the foreign State over the non-State armed group necessary to render an armed conflict international in such a way is debated.[99]

441 In 1999, in *Tadić*, the ICTY Appeals Chamber looked to the international law of State responsibility for guidance on this question.[100] In its 1986 *Nicaragua* decision, the International Court of Justice had identified certain levels of control for the attribution of non-State activity to a foreign State for the purposes of State responsibility: complete dependence of a non-State armed group on a foreign State for the attribution to the State of any act of the non-State armed group; or effective control of specific operations for the attribution

[96] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 10, and for multinational forces intervening within the framework of an international organization, p. 31.
[97] See e.g. Schindler, p. 150; Vité, p. 86; and, generally, Stewart.
[98] For the definition of prisoners of war, see Article 4. For the definition of protected persons under the Fourth Convention, see Article 4 of that Convention.
[99] For an overview of the debate, see e.g. Akande, pp. 57–62 and 63–64.
[100] See ICTY, *Tadić* Appeal Judgment, 1999, paras 88–114.

to the State of acts committed in the course of such operations.[101] Against that background, the ICTY developed a test of 'overall control' of a State over a non-State armed group, as best suited both for the classification of conflicts as international or non-international and for the purposes of attribution of State responsibility.[102] According to this test, what is required to create an international armed conflict and to make acts of a non-State armed group attributable to a State is a degree of control that goes 'beyond the mere financing and equipping' of the armed group by the intervening State, 'involving also participation in the planning and supervision of military operations', but not requiring 'that such control should extend to the issuance of specific orders or instructions relating to single military actions'.[103]

442 In its 2007 decision in the *Application of the Genocide Convention case*, the International Court of Justice noted that '[i]nsofar as the "overall control" test is employed to determine whether or not an armed conflict is international, ... it may well be that the test is applicable and suitable'. The International Court of Justice does not accept, however, the 'overall control' test for the attribution of wrongful acts to a State.[104]

443 In order to classify a situation under humanitarian law involving a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the *de facto* entity or non-State armed group as a whole and thus allows for the attribution of several actions to the third State.[105] Relying on the effective

[101] See ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, paras 110–116.

[102] See ICTY, *Tadić* Appeal Judgment, 1999, paras 115–145.

[103] *Ibid*. para. 145. See in this sense also ICC, *Lubanga* Decision on the Confirmation of Charges, 2007, paras 210–211, and Trial Judgment, 2012, para. 541. It has been questioned whether for the purpose of conflict classification an argumentation starting from the secondary-law level of attribution under State responsibility law is appropriate, or whether a solution on the primary-law level of international humanitarian law itself should have been found. For a discussion, see Cassese, 2007, and Milanovic, 2006 and 2007a.

[104] See ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, paras 404–407. For a detailed discussion of the suggested control tests and an assessment in particular of their practicability for the classification of a situation as an international or non-international armed conflict, see the commentary on common Article 2, paras 298–306.

[105] In opposition, effective control linked to every single operation is almost impossible to prove because it requires a level of proof that will unlikely be reached. *A fortiori*, the attribution test based on 'total control and dependence' used by the ICJ in 2007 in *Application of the Genocide Convention* and in 1986 in *Military and Paramilitary Activities in and against Nicaragua case* in order to determine the State's responsibility for any internationally wrongful act makes the test for attribution even stricter. See Hervé Ascencio, 'La responsabilité selon la Cour internationale de Justice dans l'affaire du génocide bosniaque', *Revue générale de droit international public*, Vol. 111, No. 2, 2007, pp. 285–304, at 290–292, and Jörn Griebel and

control test, on the other hand, might require reclassifying the conflict with every operation, which would be unworkable. Furthermore, the test that is used must avoid a situation in which some acts are governed by the law of international armed conflict but cannot be attributed to a State.

444 This position is not at present uniformly accepted. The International Court of Justice has determined that the overall control test can be used to classify a conflict but that the effective control standard remains the test for attribution of conduct to a State, without clarifying how the two tests would work together.[106]

v. Multinational forces in non-international armed conflict

445 No provision of international humanitarian law precludes States or an international organization sending multinational forces[107] from becoming Parties to an armed conflict if the classic conditions for the applicability of that law are met.[108] The applicability of humanitarian law to multinational forces, just as to any other actors, depends only on the circumstances on the ground, regardless of the international mandate assigned to those forces by the UN Security Council or of the designation given to the Parties potentially opposed to them. This determination will be based on the fulfilment of specific legal conditions stemming from the relevant norms of humanitarian law, i.e. common Article 3 in the case of a non-international armed conflict.

446 Thus, no matter how such forces are labelled or constituted, be it as peacekeeping forces acting pursuant to a UN Security Council resolution, or as multinational forces operating with or without a mandate from the UN Security Council, if in fact the forces are engaged in collective hostilities meeting the threshold for a non-international armed conflict against one or more armed groups, the international organization sending the multinational force or the States comprising it can become a Party/Parties to that conflict.[109]

Milan Plücken, 'New Developments regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia* v. *Serbia*', *Leiden Journal of International Law*, Vol. 21, No. 3, 2008, pp. 601–622.

[106] ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, paras 404–407.

[107] The term 'multinational forces' is used in this section to describe the armed forces put by troop-contributing countries at the disposal of a peace operation. There is no clear-cut definition of peace operations in international law. The terms 'peace operations', 'peace-support operations', 'peacekeeping operations' and 'peace-enforcement operations' do not appear in the 1945 UN Charter. They may be interpreted in various ways and are sometimes used interchangeably. In general, the term 'peace operations' covers both peacekeeping and peace-enforcement operations conducted by international organizations, regional organizations or coalitions of States acting on behalf of the international community pursuant to a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter.

[108] This is without prejudice to the distinct question whether it is the international organization as a whole or a subsidiary body of the organization that is a Party to the conflict.

[109] For a discussion of who is the Party to the conflict (e.g. the international organization or the States contributing troops to the force), see the commentary on common Article 2, paras 278–285. See also Ferraro, 2013b, pp. 588–595 and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2015, pp. 21–26.

447 Given the international background of multinational forces, it has been suggested that any conflict in which such forces engage in activities equivalent to those of a Party to the conflict is an international armed conflict, no matter whether the multinational forces fight against the State or a non-State armed group.[110] However, one may ask whether such an automatic internationalization of the conflict is appropriate, in particular when the intervening forces only become engaged in hostilities against non-State armed groups.[111] According to another view, shared by the ICRC,[112] the assessment of the international or non-international character of an armed conflict in which multinational forces become engaged follows the same differentiated approach as for interventions by individual foreign States.[113] Accordingly, the international or non-international character of the armed conflict is determined by the State or non-State character of the opposing Parties. Therefore, only when multinational forces become engaged in an armed conflict against a State will that specific conflict be of an international character, without influencing the characterization of that State's original parallel armed conflict with a non-State armed group as non-international. When, in contrast, multinational forces fight in support of a State Party against a non-State armed group, the relations between the opposing Parties will be governed by the law of non-international armed conflict.[114]

[110] See e.g. Shraga, 1998, p. 73, and David, pp. 178–186.
[111] For a discussion, see Ferraro, 2013b, pp. 596–599.
[112] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 31.
[113] See e.g. Pejic, 2007, p. 94; Ferraro, 2013b, pp. 575–579; Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 185–193; Ola Engdahl, 'The Status of Peace Operation Personnel under International Humanitarian Law', *Yearbook of International Humanitarian Law*, Vol. 11, 2008, pp. 109–138; Françoise J. Hampson, 'Afghanistan 2001–2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 242–279; and Robert Kolb, Gabriele Porretto and Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales: Forces de paix et administrations civiles transitoires*, Bruylant, Brussels, 2005.
[114] The differentiated approach in the case of intervention of multinational forces has also found the support of States party to the Geneva Conventions; see e.g. Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, p. 34:

> The NATO-led international troops of ISAF are in Afghanistan at the behest and sufferance of the Afghan Government; this means that the relevant territorial state has consented to the ISAF deployment in a manner valid under international law. Thus, notwithstanding the involvement of international troops, the conflict must be classified as 'non-international' in nature under international law because ISAF is fighting on behalf of the government authorities of Afghanistan.

b. The threshold of non-international armed conflict

i. Introduction

448 Armed violence between non-State actors and government authorities or between several non-State actors is not an unusual phenomenon. It is part of the role of the State to control violence within its borders, maintaining and restoring law and order, if necessary by exercising the monopoly of the legitimate use of force entrusted to it for that purpose.[115] Domestic law and international law, especially international and regional human rights law, as applicable, provide the framework within which a State may exercise this right.

449 In situations of violence between non-State armed groups and government authorities or between several non-State armed groups, the fundamental question is at what point such violence becomes a non-international armed conflict subject to humanitarian law.

450 The threshold for non-international armed conflicts is different to that for international armed conflicts. For international armed conflicts, any 'resort to armed force between States' is sufficient to make humanitarian law immediately applicable between them.[116] However, a situation of violence that cannot be characterized as an international armed conflict owing to the non-State character of one of the Parties is not necessarily a non-international armed conflict. The different thresholds for non-international and international armed conflict is a consequence of the fact that States may have a greater tendency to guard against regulation of their domestic affairs by international law than against regulation of their external relations with other sovereign States. This was certainly the case at the time of the adoption of common Article 3.[117]

451 The 1960 ICRC Commentary on the Third Geneva Convention, referring to the absence of a definition of the term 'armed conflict not of an international character', stated:

> [M]any of the delegations feared that it might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and

[115] Max Weber, 'Politik als Beruf', speech at Munich University, 1919, in *Gesammelte Politische Schriften*, Munich, 1921, pp. 396–450.

[116] See ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. For a detailed discussion, see the commentary on common Article 2, paras 269–277.

[117] For a detailed discussion and further references, see e.g. Milanovic/Hadzi-Vidanovic, pp. 269–272. At the Stockholm Conference in 1948, some States criticized the draft (according to which the whole of the Conventions would be applicable in non-international armed conflicts) out of a concern that 'it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage'; Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 43. States were especially concerned about the possible implications that would flow from the recognition of any legal status for non-State Parties arising under humanitarian law.

attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article?[118]

These concerns relating to sovereignty help to explain the higher threshold for the applicability of humanitarian law in non-international armed conflict than in international armed conflict.

452 It should be noted, however, that when negotiating and adopting Additional Protocol II in 1977, States established a relatively narrow scope of application specific to Additional Protocol II, without altering the scope of application of common Article 3.[119]

453 The Commentaries on the Geneva Conventions published by the ICRC under the general editorship of Jean Pictet between 1952 and 1960 listed a number of 'convenient criteria' for assessing the applicability of common Article 3.[120] As these Commentaries noted, the 'convenient criteria' were drawn from 'the various amendments discussed' during the 1949 Diplomatic Conference, considering that 'these different conditions, although in no way obligatory, constitute convenient criteria', which 'are useful as means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection'.[121]

[118] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 35. See also Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 49, and *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 35.

[119] Additional Protocol II, Article 1. See also para. 428 of this commentary and Cullen, pp. 88–101 for an overview of the drafting history of Additional Protocol II.

[120] See Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 36:

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
> (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) That the insurgent civil authority exercises *de facto* authority over the population within a determinate portion of the national territory.
> (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

See, further, Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, pp. 49–50, and *Commentary on the Fourth Geneva Convention*, ICRC, 1958, pp. 35–36. These criteria were not reproduced in the Commentary on the Second Convention.

[121] Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 50.

454 These 'convenient criteria' are merely indicative, however.[122] They stem from proposals for amendments submitted during the 1949 Diplomatic Conference at a time when the full application of the Geneva Conventions to non-international armed conflict, and not merely the application of some minimum provisions contained in common Article 3 as ultimately adopted, was still being discussed. Thus, States suggested the listed criteria for the purpose of limiting the scope of application of the future common Article 3 in view of the highly detailed and demanding duties that would fall on all Parties if the whole of the Conventions were to apply to non-international armed conflicts.[123] Since common Article 3 as finally adopted abandoned the idea of a full application of the Geneva Conventions to non-international armed conflicts, in exchange for a wide scope of application, not all of these criteria are fully adapted to common Article 3.[124] Nonetheless, if met, the 'convenient criteria' may certainly indicate the existence of a non-international armed conflict.

455 Over time, of the criteria enumerated in the Pictet Commentaries, two are now widely acknowledged as being the most relevant in assessing the existence of a non-international armed conflict: that the violence needs to have reached a certain intensity and that it must be between at least two organized Parties/armed groups. The existence of a non-international armed conflict thus needs to be assessed according to these specific criteria.

ii. Organization of the Parties to the conflict and intensity of the conflict

456 The wording of common Article 3 gives some rudimentary guidance on its threshold of application: what is required is an 'armed' 'conflict' not of an international character, in which 'Part[ies] to the conflict' are involved. This indicates that for common Article 3 to apply, a situation of violence must have reached a certain level of intensity, characterized by recourse to arms by non-State armed groups that are capable of being Parties to an armed conflict.[125]

457 The ICRC has expressed its understanding of non-international armed conflict, which is based on practice and developments in international case law, as follows:

[122] See e.g. ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 176.

[123] Thus, the criteria reflect elements of the traditional concept of belligerency, such as the necessity of recognition by the State concerned, or demand State-like features on the side of the non-State armed group, including an express declaration of submission to the binding force of the Geneva Conventions.

[124] For example, if the criterion of the recognition of the insurgent Party as a belligerent were met, that would mean that the whole of the laws of armed conflict, and not only common Article 3, would be applicable – which would make common Article 3 superfluous. It is acknowledged, however, that the original ICRC commentary advocated for common Article 3 to be applied 'as wide[ly] as possible'; see Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 36.

[125] It may be noted that the term hostilities 'refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy'. ICRC, *Interpretive Guidance*, p. 43.

Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organisation*.[126]

458 The definition of a non-international armed conflict as 'protracted armed violence between governmental authorities and organized armed groups or between such groups', as well as the determining criteria of 'intensity' and 'organization', have been extensively reflected in the practice of other institutions.[127] They have also found expression in the practice of States party to the Geneva Conventions.[128]

459 These criteria were identified as early as 1962, when a Commission of Experts convened by the ICRC to study the question of humanitarian aid to victims of internal armed conflicts assessed the question of the threshold of applicability of common Article 3.[129] Furthermore, in 1979, one authority, reaffirming a certain intensity of the hostilities and organization of the Parties as guiding elements, observed:

> Practice has set up the following criteria to delimit non-international armed conflicts from internal disturbances. In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the

[126] ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, Opinion Paper, March 2008, p. 5. The leading case for this understanding is ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70, and Trial Judgment, 1997, para. 562.

[127] See e.g. SCSL, *Sesay* Trial Judgment, 2009, para. 95, and ICC, *Bemba* Decision on the Confirmation of Charges, 2009, para. 231, and Trial Judgment, 2016, para. 128. For further examples, see Sivakumaran, 2012, p. 166.

[128] See e.g. Canada, *Use of Force for CF Operations*, 2008, para. 104.6; Colombia, *Operational Law Manual*, 2009, Chapter II; Netherlands, *Military Manual*, 2005, para. 1006; Peru, *IHL Manual*, 2004, Chapter 9, Glossary of Terms; and United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 29. See also Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment, 2007, pp. 49–52; and Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, p. 34.

[129] Invited to consider, among other things, the question in 'which cases … article 3 common to the four Geneva Conventions of August 12, 1949 [is] legally applicable', the Commission noted the following:

> [P]ractice observed enabled the Commission to define the types of situation entering the field of application of article 3. … It must be a question of an internal 'armed' conflict which gives rise to 'hostilities'. …
>
> In the Commission's opinion, the existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against a legal government, is of a collective character and consists of a minimum amount of organization. In this respect and without these circumstances being necessarily cumulative, one should take into account such factors as the length of the conflict, the number and framework of the rebel groups, their installation or action on a part of the territory, the degree of insecurity, the existence of victims, the methods employed by the legal government to re-establish order, etc.

ICRC, 'Humanitarian aid to the victims of internal conflicts. Meeting of a Commission of Experts in Geneva, 25–30 October 1962, Report', *International Review of the Red Cross*, Vol. 3, No. 23, February 1963, pp. 79–91, at 82–83.

government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organization. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements.[130]

460 In the 1990s, rulings by the ICTY and the ICTR made an important contribution to the clarification of the definition or constitutive criteria of non-international armed conflict. In order to be able to exercise their jurisdiction over grave breaches and other war crimes, the Tribunals had to establish whether the situations in which crimes had allegedly been committed constituted armed conflicts and, if so, whether they were of an international or a non-international character.[131]

461 In its decision on jurisdiction in *Tadić* in 1995, the ICTY Appeals Chamber found that the threshold of a non-international armed conflict is crossed 'whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[132] In its trial judgment in the same case in 1997, the ICTY further developed this approach by holding that the 'test applied by the Appeals Chamber … focuses on two aspects of a conflict … the intensity of the conflict and the organization of the parties to the conflict'.[133] These conclusions were subsequently reaffirmed in the case law of the ICTY and the ICTR.[134] As noted by the ICTY and the ICTR, 'the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis'.[135]

462 The approach developed in international criminal jurisprudence is congruent with the ICRC's understanding of the concept of 'armed conflict not of an

[130] See Schindler, pp. 146–147.
[131] See ICTY Statute (1993), Articles 2 and 3, and ICTR Statute (1994), Article 3.
[132] ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70.
[133] See ICTY, *Tadić* Trial Judgment, 1997, para. 562:

> (a) Protracted armed violence between governmental forces and organized armed groups
>
> 562. The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. Factors relevant to this determination are addressed in the Commentary to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention I, ('Commentary, Geneva Convention I').

[134] See e.g. ICTY, *Limaj* Trial Judgment, 2005, para. 84, and *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 175. See also e.g. ICTR, *Akayesu* Trial Judgment, 1998, paras 619–620, and *Rutaganda* Trial Judgment, 1999, paras 91–92.
[135] See ICTY, *Limaj* Trial Judgment, 2005, para. 84. See also *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 175, and ICTR, *Rutaganda* Trial Judgment, 1999, para. 92.

international character' under common Article 3. The jurisprudence of the international tribunals provides further elements helpful in understanding the content of these criteria.

463 First, with regard to the 'organization' criterion, State armed forces are presumed to be organized. In order for a non-State armed group to be sufficiently organized to become a Party to a non-international armed conflict, it must possess organized armed forces. Such forces 'have to be under a certain command structure and have the capacity to sustain military operations'.[136] In addition, '[w]hile the group does not need to have the level of organisation of state armed forces, it must possess a certain level of hierarchy and discipline and the ability to implement the basic obligations of IHL'.[137]

464 In order to assess the requisite level of organization of non-State armed groups, the ICTY identified certain indicative factors, while specifying that none of them is, in itself, essential to whether the criterion is met:

> Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.[138]

465 Second, the requisite degree of intensity may be met 'when hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces'.[139] In this light, it is understood that Article 1(2) of Additional Protocol II, which provides that the 'Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts', also defines the lower threshold of common Article 3.[140] This understanding has been confirmed by State practice

[136] ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, Opinion Paper, 2008, p. 3.

[137] Droege, 2012, p. 550. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2003, p. 19.

[138] ICTY, *Haradinaj* Trial Judgment, 2008, para. 60. See, further, ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, paras 199–203, and *Limaj* Trial Judgment, 2005, paras 94–134. Some of these elements have also been applied by the ICC; see *Lubanga* Trial Judgment, 2012, para. 537, *Katanga* Trial Judgment, 2014, para. 1186, and *Bemba* Trial Judgment, 2016, paras 134–136.

[139] ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, Opinion Paper, 2008, p. 3.

[140] See Bothe/Partsch/Solf, p. 719, noting for Article 1(2) of Additional Protocol II that the 'passage ["as not being armed conflicts"] should not be interpreted as an attempt to change the sense of common Art. 3, whose "existing conditions of application" are not modified by Art. 1 of Protocol II'. See also e.g. Abi-Saab, p. 147, noting that Article 1(2) of Additional Protocol II is, in fact, of more importance to common Article 3 than to Additional Protocol II; for more details,

in that, for other treaties applicable to non-international armed conflict, States have chosen to refer to a combination of common Article 3 and Article 1(2) of Additional Protocol II.[141]

466 The ICTY has developed a number of 'indicative factors' that can be used to assess the intensity of the violence, including:

> the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.[142]

467 As underlined by the Tribunals, the above indicators of intensity and organization are only examples, which can, but need not, all be present in a particular case in order to conclude that the criteria of intensity and organization are fulfilled in a particular situation.

468 In any case, the criteria of intensity and organization must be present cumulatively in order for a situation of violence to reach the threshold of a non-international armed conflict. Depending on the circumstances, however, it may be possible to draw some conclusions from one criterion for the other. For example, the existence of highly intense armed confrontations between State authorities and non-State armed groups, or between several non-State

see the commentary on Article 1 of Additional Protocol II. See also, for descriptions of 'internal disturbances' and 'tensions', ICRC, 'The ICRC, the League and the Report on the re-appraisal of the Role of the Red Cross (III): Protection and assistance in situations not covered by international humanitarian law, Comments by the ICRC', *International Review of the Red Cross*, Vol. 18, No. 205, August 1978, pp. 210–214. See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, paras 4475–4476.

[141] See e.g. ICC Statute (1998), Article 8(2)(c)–(d); Second Protocol to the Hague Convention for the Protection of Cultural Property (1999), Article 22(1)–(2); and Amendment to Article 1 of the 1980 Convention on Certain Conventional Weapons (2001), Article 1(2).

[142] See ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 177, footnotes with references to ICTY case law deleted. See, further, *Haradinaj* Trial Judgment, 2008, paras 49 and 90–99, and *Limaj* Trial Judgment, 2005, paras 90 and 135–170. Some of these elements have also been applied by the ICC; see *Lubanga* Trial Judgment, 2012, para. 538; *Katanga* Trial Judgment, 2014, para. 1187; and *Bemba* Trial Judgment, 2016, paras 137–141.

armed groups, may indicate that these groups have reached the level of organization required of a Party to a non-international armed conflict.

469 In sum, the intensity of the conflict and the level of organization of the opponents, assessed on the basis of a comprehensive reading of various factual indicators, are the crucial markers of such situations. The fact that these two criteria have been referred to from soon after the adoption of common Article 3, and have been reaffirmed and fleshed out over the years, confirms their decisiveness for determining the threshold of application of common Article 3. That said, there are some situations in which the interpretation of these criteria is particularly difficult.

470 In this light, it should be noted that, much like in relation to international armed conflicts, technological developments raise the question whether and at what point cyber operations can amount to a non-international armed conflict.[143] In order to determine the existence of a non-international armed conflict involving cyber operations, the same criteria apply as with regard to kinetic violence.[144] If the requirements of sufficient organization and intensity are met in situations that involve or are exclusively based on cyber operations, such situations fall under the scope of common Article 3.

471 Particular challenges arise when applying the established classification criteria to cyber operations. First, a non-State armed group that is sufficiently organized to be a Party to a conventional non-international armed conflict would be sufficiently organized to be Party to a conflict that includes or is solely based on cyber operations. However, for a group that only organizes online it may be difficult – yet arguably not impossible[145] – to determine whether it meets the threshold of organization required to become a Party to a non-international armed conflict.[146] Second, if cyber operations 'have the same violent consequences as kinetic operations, for instance if they were used to open the floodgates of dams, or to cause aircraft or trains to collide',[147] they may reach a sufficient degree of intensity to amount to a non-international armed conflict. In contrast, certain cyber operations may not have a similar impact to that of kinetic attacks but be limited to blocking internet functions, exploiting networks, or stealing, deleting or destroying data. If cyber operations

[143] See the commentary on common Article 2, paras 286–289.
[144] See Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017), Rule 83, and Droege, 2012, pp. 549–550.
[145] Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017), Rule 83, para. 13.
[146] See Droege, 2012, p. 550. For stronger opposition to the idea that 'a decentralized virtual group' may qualify as a Party to a non-international armed conflict, see Robin Geiss, 'Cyber Warfare: Implications for Non-international Armed Conflicts', *International Law Studies*, U.S. Naval War College, Vol. 89, 2013, pp. 627–645, at 637.
[147] Droege, 2012, p. 551.

consist exclusively of the latter kind of acts, the intensity of violence as required under humanitarian law is unlikely to be reached.[148]

iii. Duration as an independent criterion?

472 The use of the term '*protracted* armed violence' in some definitions raises the question whether the duration of hostilities between governmental authorities and non-State armed groups or between such groups constitutes an independent, additional criterion to determine the existence of a non-international armed conflict.

473 The duration of hostilities is particularly suited to an assessment after the fact, for example during judicial proceedings. From the perspective of the practical application of humanitarian law, an independent requirement of duration could, in contrast, lead to a situation of uncertainty regarding the applicability of humanitarian law during the initial phase of fighting among those expected to respect the law, or to a belated application in situations where its regulatory force was in fact already required at an earlier moment.

474 The duration of hostilities is thus appropriately considered to be an element of the assessment of the intensity of the armed confrontations. Depending on the circumstances, hostilities of only a brief duration may still reach the intensity level of a non-international armed conflict if, in a particular case, there are other indicators of hostilities of a sufficient intensity to require and justify such an assessment.[149]

475 In this respect, the ICTY, clarifying its understanding of duration as one of the indicators of the intensity of the armed confrontations, noted:

[148] It remains to be seen how State practice on classifying cyber operations as non-international armed conflicts will develop. Some commentators accept that in the light of 'ever more destructive and disruptive cyber operations and societies becoming deeply dependent on the cyber infrastructure, State practice accompanied by *opinio juris* can be expected to result in a lowering of the current threshold'; Michael N. Schmitt, 'Classification of Cyber Conflict', *Journal of Conflict and Security Law*, Vol. 17, No. 2, 2012, pp. 245–260, at 260.

[149] See e.g. Sivakumaran, 2012, pp. 167–168. In 1997, in the *Tablada case*, the Inter-American Commission on Human Rights, generally applying the criteria of intensity and organization, came to the conclusion that an attack by 42 armed persons against an army barracks, leading to combat lasting about 30 hours, had crossed the threshold of a non-international armed conflict; see *Case 11.137 (Argentina)*, Report, 1997, paras 154–156. But see Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, pp. 34–35:

> As regards the time component of an armed conflict, the Code of Crimes Against International Law (VStGB) stipulates that the fighting must have a certain duration. … This does not mean that military operations must be carried out without interruption. On the other hand, the hostilities carried out with armed force must usually last significantly longer than hours or days (however, also see the Inter-American Commission on Human Rights, Report no. 55/97 Case no. 11.137 in Argentina, in which an attack on a military barracks lasting only two days was classified as an 'armed conflict' due to its unusual intensity).

> The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the 'intensity' criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; . . .[150]

476 However, the ICTY also noted that the duration of armed confrontations should not be overlooked when assessing whether hostilities have reached the level of intensity of a non-international armed conflict:

> [C]are is needed not to lose sight of the requirement for protracted armed violence in the case of [a]n internal armed conflict, when assessing the intensity of the conflict. The criteria are closely related. They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.[151]

477 The negotiation and adoption in 1998 of the ICC Statute offered States a new opportunity to address the question of the definition or constitutive criteria of a non-international armed conflict – including the question of how protracted the armed confrontations have to be. States adopted one war crime provision reflecting common Article 3, Article 8(2)(c) of the ICC Statute, and one war crime provision listing other serious violations of the laws of war, Article 8(2)(e) of the Statute. With respect to Article 8(2)(c), States restated the scope of application of common Article 3, adding only the clarifying exclusion of internal disturbances and tensions found in Article 1(2) of Additional Protocol II.[152] The scope of application adopted by States for the list of other war crimes under Article 8(2)(e) is contained in Article 8(2)(f) and reads:

> [It] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups. [Emphasis added.]

[150] ICTY, *Haradinaj* Trial Judgment, 2008, para. 49. See, in contrast, an early ICTY judgment, which noted that 'in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved'; see *Delalić* Trial Judgment, 1998, para. 184.
[151] ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 175.
[152] See ICC Statute (1998), Article 8(2)(d).

478 After the adoption of the ICC Statute, a question was raised whether this provision created a distinct type of non-international armed conflict.[153] Some interpreted the reference to 'protracted armed conflict' as creating a new, intermediary type of non-international armed conflict, situated between common Article 3 and Additional Protocol II.[154] Others believed that Article 8(2)(f) of the ICC Statute did not envisage a new form of non-international armed conflict as the use of the term 'protracted armed conflict' had served the purpose of preventing the inclusion of the restrictive criteria of Additional Protocol II in the ICC Statute, offering States a compromise formula inspired by the ICTY case law.[155] The first ICC judgments do not endorse the existence of two distinct types of non-international armed conflict under Article 8(2)(c) and (e) of the ICC Statute.[156] To establish the existence of a non-international armed conflict, the prosecutor has had to prove that armed groups show a sufficient degree of organization to enable them to carry out protracted armed confrontations.[157] These Trial Chambers clearly rejected the requirements for an armed group to have control over part of the territory or to be under responsible command borrowed from Article 1(1) of Additional Protocol II, as applicable under Article 8(2)(e) of the ICC Statute.[158] Furthermore, as Article 8(2)(f) specifies that the violence must not be sporadic or isolated, Trial Chambers have considered the intensity of the armed conflict.[159] In appraising the intensity of a conflict, the ICC has used factors similar to those used by the ICTY Trial Chambers, clearly showing that the intensity of the armed hostilities and the organized character of the armed groups are the two criteria necessarily defining any armed conflict of a non-international character.

iv. Participation of additional armed forces in a pre-existing non-international armed conflict

479 As stated above, multinational or foreign armed forces can become a Party to an armed conflict, whether collectively or as individual States, when they are taking part in a peace operation.[160] When it comes to peace operations in which a non-international armed conflict is occurring, the ICRC is of the view that it

[153] For an overview of the various views, see Vité, pp. 80–83, with further references, and Cullen, pp. 174–185.
[154] See e.g. Sassòli/Bouvier/Quintin, Vol. I, p. 123; Condorelli, pp. 112–113; and Bothe, 2002, p. 423.
[155] See e.g. von Hebel/Robinson, pp. 119–120; Meron, 2000, p. 260; and Fleck, p. 588.
[156] See ICC, *Lubanga* Trial Judgment, 2012, paras 534–538, and *Katanga* Trial Judgment, 2014, paras 1183–1187.
[157] See ICC, *Lubanga* Trial Judgment, 2012, para. 536; *Katanga* Trial Judgment, 2014, para. 1185; and *Bemba* Trial Judgment, 2016, paras 134–136.
[158] See ICC, *Lubanga* Trial Judgment, 2012, para. 536; *Katanga* Trial Judgment, 2014, para. 1186; and *Bemba* Trial Judgment, 2016, para. 136.
[159] See, in particular, ICC, *Lubanga* Trial Judgment, 2012, para. 538; *Katanga* Trial Judgment, 2014, para. 1187; and *Bemba* Trial Judgment, 2016, paras 138–140.
[160] See paras 445–447 of this commentary.

is not always necessary to assess whether, on their own, the actions of multinational forces meet the level of intensity required for the existence of a new non-international armed conflict in order for them to become Parties to that conflict. This may be the case, for instance, in situations in which there is a non-international armed conflict between the government of a State and a non-State armed group and in which foreign forces support the government. Or, it may be the case when multinational forces are already involved in a non-international armed conflict against a non-State armed group and additional foreign forces provide support to the multinational forces. A third scenario might see multinational forces engaged in a non-international armed conflict, with some national contingents providing support short of involvement in the collective conduct of hostilities. In the latter two cases, depending on the function(s) they fulfil, the States sending such forces may also become parties to the non-international armed conflict. This is because that criterion has already been met by the existence of the non-international armed conflict in which they are participating.[161]

480 It is important to emphasize that such an approach to determining who is a Party to a non-international armed conflict complements, but does not replace, the determination of the applicability of humanitarian law on the basis of the criteria of the organization of the Parties and the intensity of the hostilities. Furthermore, not all actions/forms of participation/forms of support would mean that multinational forces would become Parties to a pre-existing non-international armed conflict. The decisive element would be the contribution such forces make to the collective conduct of hostilities. Only activities that have a direct impact on the *opposing* Party's ability to carry out military operations would turn multinational forces into a Party to a pre-existing non-international armed conflict. In contrast, activities such as those that enable the Party that benefits from the participation of the multinational forces to build up its military capacity/capabilities would not lead to the same result. Some concerns about this approach have nevertheless been expressed.[162]

v. Specific purpose as an additional criterion?

481 Another question that may arise is whether, apart from the intensity of the conflict and the organization of the armed group(s), additional criteria come into play in determining whether a situation of violence amounts to a non-international armed conflict, and not merely a case of common criminality, even if it is intense and well organized.

[161] For a description of this approach, see Ferraro, 2013b, especially pp. 583–587.
[162] See the remarks by Marten Zwanenburg and Mona Khalil, in 'Peace Forces at War: Implications Under International Humanitarian Law', in *Proceedings of the 108th Annual Meeting of the American Society of International Law*, April 7–12, 2014, pp. 149–163.

482 In particular, political purpose has been noted as a typical characteristic of non-international armed conflict.[163] The inclusion of certain purposes as a necessary element of non-international armed conflict was discussed during the negotiation of common Article 3. However, States did not adopt the proposals to that effect.[164]

483 Over the years, the purpose of engaging in acts of violence has been explicitly rejected as a criterion for establishing whether or not a situation amounts to a non-international armed conflict. As held by the ICTY,

> the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.[165]

484 It should also be considered that introducing political motivation as a prerequisite for non-international armed conflict could open the door to a variety of other motivation-based reasons for denying the existence of such armed conflicts.[166] Furthermore, in practice it can be difficult to identify the

[163] See e.g. Gasser, p. 555:

> Non-international armed conflicts are armed confrontations that take place within the territory of a State, that is between the government on the one hand and armed insurgent groups on the other hand. The members of such groups – whether described as insurgents, rebels, revolutionaries, secessionists, freedom fighters, terrorists, or by similar names – *are fighting to take over the reins of power, or to obtain greater autonomy within the State, or in order to secede and create their own State.* … Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the *struggle for power.* [Emphasis added.]

[164] The draft that ultimately became common Article 3 submitted to the International Conference of the Red Cross in Stockholm in 1948 gave specific examples of 'cases of armed conflict which are not of an international character', namely 'cases of civil war, colonial conflicts, or wars of religion'. However, these examples were rejected by the Stockholm Conference, following discussions during which the view prevailed that too much detail risked weakening the provision, as it was impossible to foresee all future circumstances and as the character of a situation is independent of its motives. During the 1949 Diplomatic Conference, the Danish delegation suggested 'to add a criterion to the conditions of application, [specifying] that the word "political armed conflict" should be inserted. This would differentiate between cases of a judicial character and those of a political character'. However, the French delegation responded that it 'did not consider that the adjective "political" was appropriate, because the conflict might be of a religious character or have aspects pertaining to common law. The French Government was prepared to apply the principles contained in the text of the second Working Party, even to bandits'; see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 99. The Danish proposal was not pursued.

[165] See ICTY, *Limaj* Trial Judgment, 2005, para. 170. See also Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, p. 33: 'For purposes of classifying armed conflicts involving non-state actors, the political orientation or other motivations of the parties involved are legally irrelevant, as is the manner in which they describe themselves and their actions.' See also Germany, Federal Prosecutor General, *Targeted Killing in Pakistan case*, Decision to Terminate Proceedings, 2013, pp. 741–742.

[166] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 11.

motivations of a non-State armed group. What counts as a political objective, for example, might be controversial; non-political and political motives may co-exist; and non-political activities may in fact be instrumental in achieving ultimately political ends.[167]

485 In the view of the ICRC, the question whether a situation of violence amounts to a non-international armed conflict should therefore be answered solely by reliance on the criteria of intensity and organization.[168]

3. *Geographical scope of application*

a. Introduction

486 Once the existence of a non-international armed conflict has been established based on the character of the Parties involved, as well as on the intensity of the conflict and the organization of the Parties, common Article 3 is applicable. There is some debate, however, as to the geographical scope of application of humanitarian law governing non-international armed conflict as described by common Article 3.

487 Furthermore, when hostilities cross the boundaries of a single State, the question arises as to whether the geographic location of actions affects the classification of the situation as a non-international armed conflict.

488 Owing to developments in practice, these questions have gained considerable prominence, in particular with respect to questions on the use of force. They are, at the time of writing, the subject of ongoing discussion.[169]

b. 'Internal' non-international armed conflicts

489 Traditionally, non-international armed conflicts have predominantly been understood as conflicts occurring within the confines of a single State, in the sense of an 'internal' armed conflict.[170] The applicability of common Article 3 and

[167] See e.g. Vité, p. 78, and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 11.

[168] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, pp. 11–12. See also Akande, p. 52, with further references, and Moir, 2015, pp. 408–409.

[169] See e.g. Akande; Anderson; Arimatsu; Bartels, 2012; Bianchi, pp. 10–11; Blank; Corn/Jensen; Corn, 2013; Ferraro, 2013a; Koh, pp. 218–220; Kreß; Milanovic/Hadzi-Vidanovic; Pejic, 2011; Radin; Sassòli, 2006; Schmitt; Schöndorf; Sivakumaran, 2012, pp. 228–235 and 250–252; and Vité. See also ILA Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law* (ILA, *Report of the Seventy-Fourth Conference*, The Hague, 2010), and Terry D. Gill *et al.* (eds), 'The Conduct of Hostilities Under International Humanitarian Law: Challenges of 21st Century Warfare', Final Report of the ILA Study Group on the Conduct of Hostilities, *Yearbook of International Humanitarian Law*, Vol. 19, 2016, pp. 287–336.

[170] This was the interpretation provided in the Pictet Commentaries: 'conflicts … which … take place within the confines of a single country'; see Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 36 (see also *Commentary on the Second Geneva Convention*, ICRC, 1960, p. 33, and *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 37. This statement was not made in the commentary on the First Convention.) See also

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humanitarian law governing non-international armed conflict more generally to these 'internal' non-international armed conflicts is not controversial.

490 However, the question has arisen as to whether humanitarian law applies in the whole of the territory of the State concerned or only in areas where hostilities are occurring. In areas of a State where hostilities are few and far between or even non-existent it may seem questionable whether humanitarian law applies. There is concern that humanitarian law, and especially the rules on the conduct of hostilities, should not apply in regions where hostilities are not taking place, even in a State in which an armed conflict is occurring. In the more peaceful regions of such a State, the State's criminal law and law enforcement regimes, within the boundaries set by the applicable international and regional human rights law, may provide a sufficient legal framework.[171]

491 The wording of common Article 3, however, indicates that, once a non-international armed conflict has come into existence, the article applies in the whole of the territory of the State concerned: 'the following acts are and shall remain prohibited at any time and *in any place whatsoever*' (emphasis added).

492 In 1995, in *Tadić*, the ICTY noted the following:

> 67. . . . the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. . . .
> . . .
> 69. . . . beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. . . .
> 70. . . . international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[172]

493 Once the threshold of a non-international armed conflict has been crossed in a State, the applicability of common Article 3 and other humanitarian law provisions governing non-international armed conflict can therefore generally be seen as extending to the whole of the territory of the State concerned.[173]

Gasser, p. 555; San Remo Manual on the Law of Non-International Armed Conflict (2006), para. 1.1.1; and Milanovic, 2007b, pp. 379–393.

[171] Even where humanitarian law applies, a State's domestic law continues to apply, in addition to international human rights law, to the extent that a State has not made a derogation.

[172] ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, paras 67–70. See, further, *Delalić* Trial Judgment, 1998, para. 185, and ICTR, *Akayesu* Trial Judgment, 1998, para. 636.

[173] See e.g. Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, p. 36: '[T]he basic objectives of international humanitarian law and the practical impossibility of differentiating in this context tend to support the conclusion that, in principle, a subject of international law such as Afghanistan – including its allies – cannot be involved in a non-international armed conflict except as a territorial whole.' See, further, David, pp. 261–262, and Kleffner, 2013b, p. 59. For the

494 However, the applicability of humanitarian law in the whole of the territory of a State party to the conflict does not mean that all acts within that territory therefore fall necessarily under the humanitarian law regime. As noted by the ICTY, a particular act must be 'closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict' for that act to be committed in the context of the armed conflict and for humanitarian law to apply.[174] The applicability of humanitarian law to a specific act therefore requires a certain nexus between that act and the non-international armed conflict. Acts that have no such connection to the conflict generally remain regulated exclusively by domestic criminal and law enforcement regimes, within the boundaries set by applicable international and regional human rights law.[175]

495 Furthermore, if a specific act carried out or taking effect in more peaceful areas of a State could – in line with the considerations addressed above – generally fall under the scope of application of humanitarian law, questions regarding the applicable legal standards in a particular scenario might still arise. It may also need to be determined whether, in a given case, a specific use of force is necessarily governed by conduct of hostilities law or whether it is governed by the law enforcement regime based on human rights law.[176]

496 These issues are the subject of some discussion.[177] In situations of actual hostilities, the use of armed force against lawful targets by the parties to the armed conflict is governed by the humanitarian law rules on the conduct of hostilities.[178] The situation is less clear, however, with regard to the use of force against isolated individuals who would normally be considered lawful targets, under international humanitarian law but who are located in regions under the State's firm and stable control, where no hostilities are taking place and it is not reasonably foreseeable that the adversary could readily receive reinforcement.

purposes of humanitarian law, a State's territory includes not only its land surface but also rivers and landlocked lakes, the territorial sea, and the national airspace above this territory.

[174] See ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. This interpretation has been followed by the ICC; see ICC, *Katanga* Trial Judgment, 2014, para. 1176, and *Bemba* Trial Judgment, 2016, paras 142–144.

[175] See e.g. ICRC, *The Use of Force in Armed Conflicts*, p. 5: 'In order to be covered by IHL, the use of force must take place in an armed conflict situation and must have a nexus with the armed conflict.' From the perspective of international criminal law, see, further, e.g. ICTR, *Akayesu* Trial Judgment, 1998, para. 636, and ICTY, *Kunarac* Appeal Judgment, 2002, paras 58–59. This might also include emergency laws.

[176] For a detailed discussion, with further references, see ICRC, *The Use of Force in Armed Conflicts*, pp. 13–23, addressing the example of the use of force against legitimate targets during armed conflict.

[177] See expert meetings on the notion of direct participation in hostilities under humanitarian law and on the use of force in armed conflicts. For details, see ICRC, *Interpretive Guidance* and *The Use of Force in Armed Conflicts*.

[178] The question of who or what is a lawful target is a separate issue. For details, see the commentary on Article 13 of Additional Protocol II. For persons, the position of the ICRC is set out in *Interpretive Guidance*.

497 The law is not yet settled on this issue. However, a number of different legal readings have been advanced, which can be loosely grouped into four approaches. According to one view, the humanitarian law rules on the conduct of hostilities will govern the situation described above, without restraints other than those found in specific rules of humanitarian law.[179] According to the second view, the use of force in that scenario is to be governed by Recommendation IX of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.[180] That Recommendation in conjunction with its commentary states that in the more peaceful areas of a State, the 'kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.[181] Yet another view holds that the applicable legal framework for each situation will need to be determined on a case-by-case basis, weighing all of the circumstances.[182] Lastly, there is the view that in such circumstances, the use of force would be governed by the rules on law enforcement based on human rights law.[183]

[179] Under this view, while the principles of military necessity and humanity inform the entire body of humanitarian law, they do not create obligations above and beyond specific rules of humanitarian law. See e.g. W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', *N.Y.U. Journal of International Law and Politics*, Vol. 42, 2009–2010, pp. 769–830.

[180] In 2009, the ICRC published the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, which addressed the use of force from the perspective of humanitarian law only, without prejudice to other bodies of law – particularly human rights law – that may concurrently be applicable in a given situation.

[181] The full text of Recommendation IX reads:

> In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

Under this view, the fundamental principles of military necessity and humanity reduce the sum total of permissible military action from that which humanitarian law does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances; ICRC, *Interpretive Guidance*, pp. 77–82. It is acknowledged that, at the time of writing, this interpretation is not universally shared. See e.g. 'Forum: The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law', *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 637–916.

[182] Marco Sassòli and Laura Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 599–627, at 603–605. See also ICRC, *The Use of Force in Armed Conflicts*, pp. 20–21.

[183] Charles Garraway, 'Armed Conflict and Law Enforcement: Is There a Legal Divide?, in Mariëlle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face, Liber Amicorum in Memory of Avril McDonald*, Asser Press, The Hague, 2013, pp. 259–283, at 282.

498 It may be observed that the application of any of the last three approaches may be likely to lead to similar results in practice.

c. Non-international armed conflict not confined to the territory of one State

499 As noted above, traditionally non-international armed conflicts have predominantly been understood as armed conflicts against or between non-State armed groups within the confines of a State, in the sense of an 'internal' armed conflict.[184] However, that raises the question whether the limitation to the territory of one State is a requirement for a non-international armed conflict in the sense of common Article 3.

500 At first sight, the wording of common Article 3 requires such a limitation: not only does it speak of armed conflicts 'not of an international character',[185] but it also requires armed conflicts to occur 'in the territory of one of the High Contracting Parties'. One reading of this phrase could be that the conflict must occur in the territory of precisely 'one' of the High Contracting Parties, thereby limiting the application of common Article 3 to 'internal' armed conflicts. However, another reading could put the emphasis on the fact that the conflict must occur in the territory of one of the 'High Contracting Parties', thereby merely excluding conflicts which occur on the territory of a State not party to the Geneva Conventions.[186] Common Article 2 likewise contains a reference to the States party to the Geneva Conventions. Viewed in this context, the reference to 'High Contracting Parties' in both articles may have been included to avoid any misunderstanding to the effect that the 1949 Geneva Conventions would create new obligations for States not party to them.

501 The object and purpose of common Article 3 supports its applicability in non-international armed conflict reaching beyond the territory of one State. Given that its aim is to provide persons not or no longer actively participating in hostilities with certain minimum protections during intense armed confrontations between States and non-State armed groups or between such groups, it is logical that those same protections would apply when such violence spans the territory of more than one State.[187]

502 It is true, however, that when common Article 3 is applicable, other rules, especially those on the conduct of hostilities, with different restraints on the way force may be used compared to peacetime law, may also apply. It must be recalled that it is not the applicability of common Article 3 to a situation that makes other rules of humanitarian law governing non-international armed conflicts applicable. Rather, it is the existence of a non-international armed

[184] See para. 489 of this commentary.
[185] Which can, but not necessarily must, be understood primarily as a reference to the State or non-State character of the Parties to a potential non-international armed conflict; see section C.2.b.
[186] See, in this sense, e.g. Sassòli, 2006, p. 9.
[187] See, in this sense, e.g. *ibid*.

conflict which makes common Article 3 and other humanitarian law provisions applicable.[188] Viewed in this light, it may be consistent with the purpose of common Article 3 for it to apply to non-international armed conflicts that are not confined to the territory of a single State.

503 Insofar as the above analysis leaves doubt as to whether common Article 3 is limited to internal armed conflicts,[189] the drafting history of the article can be consulted for clarification. At one point, States considered a draft which referred to armed conflicts 'which may occur in the territory of one *or more* of the High Contracting Parties' (emphasis added).[190] For unspecified reasons, the additional phrase 'or more' was not adopted by the 1949 Diplomatic Conference, such that no conclusion can be drawn from its absence for the interpretation of common Article 3.[191] In the 1940s, it seems that States predominantly had the regulation of internal armed conflicts in mind. The protection of their domestic affairs against comprehensive regulation by international law was one of their main concerns and motivators for limiting the substantive provisions applicable to non-international armed conflicts.[192] However, if the wording of common Article 3 'meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not "non-international armed conflicts", there would be a gap in protection, which could not be explained by states' concerns about their sovereignty'.[193]

504 In sum, while the text and drafting history are somewhat ambiguous, the object and purpose of common Article 3 suggests that it applies in non-international armed conflicts that cross borders.

505 At the time of writing, there is some evidence of practice by States party to the Geneva Conventions that supports the view that non-international armed conflicts may occur across State borders in certain, limited circumstances.[194]

[188] In this respect, it must be recalled that common Article 3 does not define non-international armed conflict; it merely indicates those armed conflicts to which it applies.

[189] State practice is examined below, paras 507–512 of this commentary.

[190] See *Draft Conventions submitted to the 1948 Stockholm Conference* and *Draft Conventions adopted by the 1948 Stockholm Conference*, p. 10. See also section B of this commentary.

[191] For a detailed history, see Katja Schöberl, 'The Geographical Scope of Application of the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pp. 67–83, at 79–82.

[192] See e.g. *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 10–15. See also section B of this commentary.

[193] Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law', *HPCR Occasional Paper Series*, Winter 2006, p. 9.

[194] See United States, Supreme Court, *Hamdan case*, Judgment, 2006, pp. 66–67. Germany's Military Manual notes that a non-international armed conflict is a confrontation that is 'normally' carried out within the territory of a State; while emphasizing the typically internal character of non-international armed conflict, this wording also seems to allow for situations where this is not the case; see *Military Manual*, 2013, p. 186, para. 1301. See also Netherlands, Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague, July 2013, p. 3 ('In non-international armed conflicts between one or more states and one or more organised armed groups, or between such

506 Non-international armed conflicts with an extraterritorial aspect have been described variously as 'cross-border' conflicts, 'spillover' conflicts and 'transnational armed conflicts'. Other terms, such as 'extraterritorial non-international armed conflicts' have also been used.[195] These are not legal categories or terms, but they may be useful for descriptive purposes.

507 One type of armed conflict not confined to the borders of a single State that States appear to have accepted as 'non-international' in practice occurs when a State fighting an armed group on its territory is joined by one or more other States. Although such a conflict may occur within the territory of one State, other States use force extraterritorially, i.e. outside their own territory, as Parties to the conflict. In such cases, the conflict remains non-international in nature.[196] The question of the extent of the applicability of common Article 3 and humanitarian law more generally has become pertinent in such situations, particularly where the territory of that State is subdivided into areas of responsibility of the various intervening foreign States, with some areas experiencing more intense fighting than others. In such situations, humanitarian law applies in the same manner in regard to all participating States as in a purely 'internal' non-international armed conflict as outlined above.[197] Further questions have arisen in respect to whether international law also applies on the 'home' territory of States party to such conflicts.[198] At the time of writing, there is insufficient identifiable State practice on its applicability in the territory of the home State.

508 Second, an existing non-international armed conflict may spill over from the territory of the State in which it began into the territory of a neighbouring State not party to the conflict.[199] These are sometimes called 'spillover' non-international armed conflicts, although this is only a descriptive term and not

groups, in principle IHL applies only to the territory of the state where the conflict is taking place.'), and United States, *Law of War Manual*, 2016, pp. 73–74, para. 3.3.1 ('[T]wo non-State armed groups warring against one another or States warring against non-State armed groups may be described as "non-international armed conflict," even if international borders are crossed in the fighting.')

195 See Vité, p. 89.

196 See paras 436–439 of this commentary. This is without prejudice to whether a separate international armed conflict exists between the territorial government and the States concerned; for details see the commentary on common Article 2, paras 290–297.

197 The conflict in Afghanistan after 2002 is widely considered to be an example of a non-international armed conflict in which a number of States participate extraterritorially.

198 See e.g. Schmitt, pp. 10–11.

199 See Germany, Federal Prosecutor General at the Federal Court of Justice, *Targeted Killing in Pakistan case*, Decision to Terminate Proceedings, 2013, p. 742: 'the Afghan Taliban's use of the FATA region as a haven and staging area has evidently caused the Afghan conflict to "spill over" onto this particular part of Pakistan's national territory.' See also p. 723:

> At the time of the drone strike [4 October 2010], there existed at least two separate non-international armed conflicts. One was between the government of Pakistan and non-State armed groups operating in the FATAs (including Al Qaeda). Another one was between the Afghan Taliban and affiliated groups and the government of Afghanistan, as supported by ISAF forces, a conflict which spilled over into the territory of Pakistan.

a legal term of art. Assuming, for the purpose of this analysis, that the second State consents to the use of its territory by the State party to the conflict, thereby precluding the existence of an international armed conflict between the two States, the question arises as to whether the relations between the first State and the non-State party to the conflict continue to be regulated by humanitarian law governing non-international armed conflicts when the Parties are operating in the territory of the second, neighbouring State.[200] This could be the case if the armed violence between them, on the territory of the second State, in itself meets the criteria of a non-international armed conflict, i.e. intensity and organization. But where this is not the case, and when only occasional or sporadic acts of hostilities take place there, one may wonder whether this occasional 'spillover' can be linked to the existing non-international armed conflict in the first State, as a mere continuation of that conflict.[201] In such cases, State practice seems to indicate that the crossing of an international border does not change the non-international character of the armed conflict.[202] The examples of State practice in relation to 'spillover' conflicts all relate to situations in which the conflict has spilled over from one territory into a neighbouring or adjacent territory.[203]

Netherlands, Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague, July 2013, p. 3: 'The applicability of IHL may be extended if the conflict spills over into another state in cases where some or all of the armed forces of one of the warring parties move into the territory of another – usually neighbouring – state and continue hostilities from there.' Further examples of conflicts which have been considered to spill over into the territory of another State are given in Milanovic, 2015, paras 52, 56 and 58 (citing spillovers from the Democratic Republic of the Congo into neighbouring countries; incursions of Ogaden militias from Ethiopia and Al-Shebab militias from Somalia into Kenya; Kurds into Turkey and Iran; and by Colombian armed forces and the Revolutionary Armed Forces of Colombia (FARC) into Ecuador). Melzer, pp. 259–260, cites, among others, Sudan giving consent to Uganda to conduct operations on its territory against the Lord's Resistance Army; South African operations in Botswana, Mozambique and Zimbabwe against the African National Congress; and the spillover of the Vietnam conflict into Cambodia.

[200] This question may also arise when the second State does not give its consent. In that case an international and a non-international armed conflict may exist concurrently.

[201] As the ICTY has noted, individual acts that are 'closely related' to confrontations carried out in other parts of the territory of a State can be linked to that non-international armed conflict; see *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. It has been suggested that the same consideration could apply in spillover situations; see Milanovic/Hadzi-Vidanovic, pp. 290–291.

[202] See the practice listed in fn. 199. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, pp. 9–10, noting:

> [I]t is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL [international humanitarian law]. This position is based on the understanding that the spill over of a NIAC [non-international armed conflict] into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.

[203] The considerations regarding the geographical scope of application of common Article 3 on land would apply *mutatis mutandis* to a spillover to the territorial sea of another State.

509 The existence of such situations also seems to be acknowledged in the 1994 ICTR Statute, which describes the jurisdiction of the Tribunal as extending to the prosecution of 'Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations *committed in the territory of neighbouring States*' (emphasis added).[204]

510 Questions remain, however, as to how far into a neighbouring country an existing non-international armed conflict can be seen as 'spilling over'. Put another way, it is not yet clear whether humanitarian law would be applicable throughout the territory of the State into which the conflict has spilled over (as in the case of classic 'internal' armed conflicts), or whether its application is more limited.[205] As long as the State into whose territory the conflict has spilled does not become a Party to the conflict, there is reason to doubt that it applies throughout its whole territory.[206] Practice has not yet established a clear rule, although different legal theories have been put forward.[207] In addition, the question arises as to whether, depending on geographical circumstances or technical abilities, the 'spilling over' of an existing non-international armed conflict is limited to neighbouring countries. This last scenario will be addressed below.

511 A third scenario of a non-international armed conflict not limited to the territory of one State is that of armed confrontations, meeting the requisite intensity threshold, between a State and a non-State armed group which operates from the territory of a second, neighbouring State.[208] The armed confrontations could also be between two organized non-State armed groups. In such a scenario, the confrontations are of a 'cross-border' nature. If the non-State armed group acts on behalf of the second State, an international armed conflict may exist because in that case the confrontation would in fact be between two States.[209] However, if the non-State armed group does not act on behalf of the second State, it is conceivable that the confrontation between the first State and the non-State armed group should be regarded as a non-international armed

[204] ICTR Statute (1994), Title and Preamble. But see ICTR, *Musema* Trial Judgment, 2000, para. 248: 'The expression "armed conflicts" introduces a material criterion: … Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups *within the territory of a single State*' (emphasis added).

[205] Schöberl, p. 82; Lubell/Derejko, p. 78.

[206] ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70 (humanitarian law applies to the whole of the territory under the control of one of the Parties).

[207] For example, limiting the applicability of humanitarian law only to people, places and objects with a nexus to the armed conflict. See e.g. Milanovic/Hadzi-Vidanovic, pp. 307–308; Lubell/Derejko, pp. 75–76; and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2015, p. 15, fn. 13.

[208] For discussions, see e.g. the literature referenced in fn. 169.

[209] See paras 440–444 of this commentary and paras 298–306 of the commentary on Article 2.

conflict.[210] In such a situation, an international armed conflict between the first and the second State could also occur if the second State does not consent to the operations of the first State in its territory.[211] Thus, there may be a non-international armed conflict, in parallel to an international armed conflict between the States concerned.

512 Lastly, the question arises as to whether geographical considerations could play a minimal role with respect to non-international armed conflicts.[212] For example, the question has arisen whether a non-international armed conflict between a non-State armed group and a State could exist, with or without having an anchor in a particular State as the primary or key theatre of hostilities. There are two possible scenarios. The first is the situation of an extended spillover conflict described above. In this scenario, the intensity and organization are sufficient for a conflict to arise and be classified as such in the primary theatre of hostilities and the only question remaining is how far the spillover may stretch. A second scenario considers the possibility of a conflict arising solely on the basis of the actions of a non-State armed group but where hostilities and the members of the armed group are in geographically disparate locations. In that scenario, the main question is whether it is possible to assess far-flung hostilities as a whole so as to conclude that there is one armed conflict between a non-State armed group and a State. Thus, while not abandoning the criteria of organization and intensity required for a non-international armed conflict to exist, this approach would accept that acts that may seem sporadic or isolated within the confines of each State in which they occur may be considered cumulatively as amounting to a non-international armed conflict.

513 The assumption of such a global or transnational non-international armed conflict could make humanitarian law applicable in the territory of a State not involved in the confrontation between the Parties to such a conflict, where otherwise domestic law, including criminal law and law enforcement rules on the use of force, within the boundaries of applicable human rights law, would apply exclusively.

514 This scenario raises important protection concerns. It would mean, for example, that when a Party to such a global or transnational non-international armed conflict attacks an individual fighter of the opposing Party in the territory of another State not involved in the conflict, the population of that State could be subject to the application of humanitarian law standards on the use of force. Under humanitarian law, for example, only attacks on military targets

[210] See, in this respect, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 10, noting: 'Such a scenario was hardly imaginable when Common Article 3 was drafted and yet it is submitted that this Article, as well as customary IHL, were the appropriate legal framework for that parallel track, in addition to the application of the law of IAC [international armed conflict] between the two states.'

[211] For details, see the commentary on Article 2, paras 290–297.

[212] For discussions, see e.g. the literature referenced in fn. 169.

which may be expected to cause incidental loss of civilian life that would be excessive in relation to the concrete and direct military advantage anticipated would be unlawful. This would mean that, depending on the circumstances, a certain amount of 'collateral damage' among the civilian population of a State not involved in the confrontation between the Parties to the global or transnational non-international armed conflict might not be unlawful. This would considerably diminish the protection of this population under international law.

515 However, as indicated above, even if humanitarian law were to be considered applicable in such a scenario, it would not necessarily mean that all actions in such a case were governed by that law.[213]

516 In addition, the practice of States party to the Geneva Conventions in support of global or transnational non-international armed conflicts remains isolated.[214] The ICRC has thus expressed the view that the existence of an armed conflict or the relationship of a particular military operation to an existing armed conflict has to be assessed on a case-by-case basis.[215]

4. Temporal scope of application

a. Introduction

517 Common Article 3 applies to armed conflicts not of an international character that are 'occurring' in the territory of one of the High Contracting Parties. No guidance is given in common Article 3 on when such an armed conflict is to be regarded as 'occurring'. Unlike the Geneva Conventions in their application to international armed conflicts,[216] or indeed Additional Protocol I[217] and

[213] See paras 494–497 of this commentary.

[214] See e.g. United States, Remarks by President Obama at the National Defense University, 23 May 2013: 'Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces.' See also e.g. US Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, 16 July 2010, released publicly on 23 June 2014, p. 24: '... would make the DoD [Department of Defense] operation in Yemen part of the non-international armed conflict with al-Qaida'. Compare also United States, Supreme Court, *Hamdan case*, Judgment, 2006, pp. 66–67. For the question whether the US Supreme Court considered the non-international armed conflict it affirmed in that decision to be of a global character, see e.g. Milanovic, 2007b, pp. 378–379, with further references. But see Germany, Federal Prosecutor General at the Federal Court of Justice, *Targeted Killing in Pakistan case*, Decision to Terminate Proceedings, 2013, p. 745, according to which 'a determination that an armed conflict exists will be valid only where it is made with respect to a specific territorial extent and duration of time'.

[215] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 10, and for the specific context of multinational forces intervening within the framework of an international organization, pp. 10–11.

[216] See First Convention, Article 5; Third Convention, Article 5(1); and Fourth Convention, Article 6.

[217] See Additional Protocol I, Article 3.

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Additional Protocol II,[218] common Article 3 contains no specific provision whatsoever on its temporal scope of application.

b. The beginning of a non-international armed conflict

518 With respect to the beginning of the applicability of common Article 3, no specific provision is necessary: common Article 3 becomes applicable as soon as a non-international armed conflict comes into existence, in line with the analysis in the sections above, i.e. as soon as the criteria of intensity and organization are fulfilled in a situation of violence between a State and a non-State armed group or between two or more non-State armed groups.

c. The end of a non-international armed conflict

519 As with the beginning of a non-international armed conflict, determining when a conflict ends has important consequences. Therefore, as with the initial existence of a non-international armed conflict, its end must be neither lightly asserted nor denied: just as humanitarian law is not to be applied to a situation of violence that has not crossed the threshold of a non-international armed conflict, it must also not be applied to situations that no longer constitute a non-international armed conflict.

520 The ICTY has held that '[i]nternational humanitarian law applies from the initiation of [a non-international armed conflict] and extends beyond the cessation of hostilities until . . . in the case of internal conflicts, a peaceful settlement is achieved'.[219] This approach has subsequently been affirmed in international case law and restated in other national and international sources.[220]

521 It is necessary to rely on the facts when assessing whether a non-international armed conflict has come to an end, or, in other words, a 'peaceful settlement' has been reached.[221] This approach not only reflects the purely

[218] See Additional Protocol II, Article 2(2):

> At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

[219] ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70.

[220] See e.g. ICTY, *Haradinaj* Trial Judgment, 2008, para. 100; ICTR, *Akayesu* Trial Judgment, 1998, para. 619; *Rutaganda* Trial Judgment, 1999, para. 92; and ICC, *Lubanga* Trial Judgment, 2012, paras 533 and 548. It has also been reflected in State practice; see e.g. United Kingdom, *Manual of the Law of Armed Conflict*, 2004, pp. 386–387, para. 15.3.1; Council of the European Union, Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, Vol. II, 2009, pp. 299–300; Colombia, Constitutional Court, *Constitutional Case No. C-291-07*, Judgment, 2007, para. 1.2.1. For a discussion of the notion of 'peaceful settlement', see e.g. Jean-François Quéguiner, 'Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', *Revue internationale de la Croix-Rouge*, Vol. 85, No. 850, June 2003, pp. 271–311, at 282–283.

[221] See ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 293. See e.g. David, pp. 311–312, generally for the end of application of humanitarian law where there are no

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fact-based assessment of the beginning of a non-international armed conflict,[222] but is also in line with modern humanitarian law more generally, for whose applicability formal requirements are not decisive.[223]

522 An assessment of the facts to determine whether a non-international armed conflict has come to an end should take into account the following:

523 First, a non-international armed conflict can cease by the mere fact that one of the Parties ceases to exist. A complete military defeat of one of the Parties, the demobilization of a non-State Party, or any other dissolution of a Party means that the armed conflict has come to an end, even if there are isolated or sporadic acts of violence by remnants of the dissolved Party. When, however, a Party has suffered a lesser degree of defeat and is in some disarray, it may still regroup, even over a lengthy period of time, and carry on the hostilities. This may especially be the case where a non-State armed group controls territory or continues to recruit, train and arm forces. In such cases, it is not possible to conclude that the Party has ceased to exist.

524 Second, armed confrontations sometimes continue well beyond the conclusion or unilateral pronouncement of a formal act such as a ceasefire, armistice or peace agreement. Relying solely on the existence of such agreements to determine the end of a non-international armed conflict could therefore lead to a premature end of the applicability of humanitarian law in situations when in fact a conflict continues.[224] Conversely, armed confrontations may also dissipate without any ceasefire, armistice or peace agreement ever being concluded, or before the conclusion of such an agreement. Thus, while the existence of such agreements may be taken into account when assessing all of the facts, they are neither necessary nor sufficient on their own to bring about the termination of the application of humanitarian law.

525 Third, a lasting cessation of armed confrontations without real risk of resumption will undoubtedly constitute the end of a non-international armed conflict as it would equate to a peaceful settlement of the conflict, even without the conclusion or unilateral pronouncement of a formal act such as a ceasefire, armistice or peace agreement.

526 Fourth, a temporary lull in the armed confrontations must not be taken as automatically ending the non-international armed conflict. The intensity of a conflict might 'oscillate',[225] but, without more, periods of calm while the

specific provisions. See also Kolb/Hyde, p. 102, for both international and non-international armed conflicts, as well as Sivakumaran, 2012, pp. 253–254.

222 See section C.2.

223 See the inclusion in common Article 2 of the concept of 'other armed conflict' in addition to the traditional formal concept of 'declared war'. For details, see the commentary on Article 2, paras 234–235.

224 See e.g. ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 293; see also the practical application in para. 294: '[T]he temporal scope of the armed conflict covered and extended beyond 12 August and the Ohrid Framework Agreement of 13 August to at least the end of that month.'

225 ICTY, *Haradinaj* Trial Judgment, 2008, para. 100.

Parties to the conflict continue to exist are not sufficient to conclude that a conflict has come to an end. It is impossible to state in the abstract how much time without armed confrontations needs to pass to be able to conclude with an acceptable degree of certainty that the situation has stabilized and equates to a peaceful settlement. A Party may, for instance, decide to temporarily suspend hostilities, or the historical pattern of the conflict may be an alternation between cessation and resumption of armed confrontations. In such cases, it is not yet possible to conclude that a situation has stabilized, and a longer period of observation will be necessary. In the meantime, humanitarian law will continue to apply.

527 The classification of a conflict must not be a 'revolving door between applicability and non-applicability' of humanitarian law, as this can 'lead[] to a considerable degree of legal uncertainty and confusion'.[226] An assessment based on the factual circumstances therefore needs to take into account the often-fluctuating nature of conflicts to avoid prematurely concluding that a non-international armed conflict has come to an end.

528 In this regard, it is not possible to conclude that a non-international armed conflict has ended solely on the grounds that the armed confrontations between the Parties have fallen below the intensity required for a conflict to exist in the first place.[227] However, the lasting absence of armed confrontations between the original Parties to the conflict may indicate – depending on the prevailing facts – the end of that non-international armed conflict, even though there might still be minor isolated or sporadic acts of violence.

529 Examples of elements that may indicate that a situation has sufficiently stabilized to consider that a non-international armed conflict has ended include: the effective implementation of a peace agreement or ceasefire; declarations by the Parties, not contradicted by the facts on the ground, that they definitely renounce all violence; the dismantling of government special units created for the conflict; the implementation of disarmament, demobilization and/or reintegration programmes; the increasing duration of the period without hostilities; and the lifting of a state of emergency or other restrictive measures.

530 A determination as to whether a situation has stabilized to such a degree and for such a time to constitute a 'peaceful settlement' of the conflict can thus only be made via a full appraisal of all the available facts. Obviously, such predictions can never be made with absolute certainty. It is not a perfect

[226] ICTY, *Gotovina* Trial Judgment, 2011, para. 1694.

[227] For a discussion, see Marko Milanovic, 'End of application of international humanitarian law', *International Review of the Red Cross*, Vol. 96, No. 893, March 2014, pp. 163–188, at 178–181. See also Bartels, 2014, pp. 303 and 309, and Grignon, pp. 270–275, who emphasizes a global end of armed conflict, comparable to the notion of general close of military operations in international armed conflicts, as decisive for the end of a non-international armed conflict. For a similar view in the context of multinational operations, see Ferraro, 2013b, p. 607, and Sivakumaran, 2012, pp. 253–254. See also Kolb/Hyde, p. 102, and Sassòli/Bouvier/Quintin, Vol. I, p. 135, paraphrasing ICTY, *Haradinaj* Trial Judgment, 2008, para. 100.

science. In this light, in the view of the ICRC, it is preferable not to be too hasty and thereby risk a 'revolving door' classification of a conflict which might lead to legal uncertainty and confusion.

d. Continuing application of common Article 3 after the end of a non-international armed conflict

531 The question arises as to whether, despite the end of a non-international armed conflict, there are certain aspects of common Article 3 that, if necessary, may continue to apply after the end of the non-international armed conflict. Common Article 3 contains no indications in this respect.

532 However, as early as 1962, the Commission of Experts convened by the ICRC to study the question of humanitarian aid to victims of internal conflicts noted:

> The Commission also examined the extent of the application of article 3 in the past. The settling of an internal conflict, dependent on article 3, does not put an end, by itself and of full right, to the application of that article, whatever the form or the conditions of this settlement may be, whether the legal government re-establishes order itself, whether it disappears in favour of a government formed by its adversaries, or whether it concludes an agreement with the other party. The Commission pointed out that the obligations described in article 3 should be respected 'in all circumstances ... at all times and in all places'. The Commission therefore considers that *the provisions of article 3 remain applicable to situations arising from the conflict and to the participants in that conflict*.[228]

533 In 1977, States adopted the following provision in the context of Additional Protocol II:

> At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.[229]

534 The guarantees of common Article 3 – binding State and non-State Parties alike – can be of vital importance for the victims of a non-international armed conflict even after the conflict as such has come to an end.

[228] See ICRC, 'Humanitarian aid to the victims of internal conflicts. Meeting of a Commission of Experts in Geneva, 25–30 October 1962, Report', *International Review of the Red Cross*, Vol. 3, No. 23, February 1963, pp. 79–91, at 83 (emphasis added). See also Sassòli/Bouvier/Quintin, Vol. I, p. 136, and David, pp. 267–268.

[229] Additional Protocol II, Article 2(2). Articles 5 and 6 of the Protocol provide protections for persons deprived of their liberty for reasons related to the armed conflict and during penal prosecutions. For details, see the commentaries on Articles 1, 5 and 6 of Additional Protocol II. For international armed conflict, compare also Article 5 of the First Convention, Article 5(1) of the Third Convention and Article 6(3) of the Fourth Convention, as well as Article 3(b) of Additional Protocol I.

535 Persons protected under common Article 3, even after the end of a non-international armed conflict, continue to benefit from the article's protection as long as, in consequence of the armed conflict, they are in a situation for which common Article 3 provides protection. Thus, for example, persons who have been detained in connection with the conflict should, after the end of the conflict, continue to be treated humanely, including not being subjected to torture or cruel treatment or being denied a fair trial.[230]

536 Insofar as the return to the normal domestic and international legal framework after the end of a non-international armed conflict would provide persons protected under common Article 3 with more favourable protections than common Article 3, such protections must, of course, be applied.[231]

D. Paragraph 1: Binding force of common Article 3

1. *'each Party to the conflict shall be bound to apply'*

a. *General*

537 Once a non-international armed conflict in the sense of common Article 3 has come into existence, common Article 3 categorically states that 'each Party to the conflict shall be bound to apply' the fundamental provisions of the article.

538 This simple but unequivocal provision is an important achievement. As soon as common Article 3 applies, the obligation to respect its provisions is automatic and absolute for State and non-State Parties to the conflict alike. That obligation is not only independent of an express acceptance of common Article 3 by the non-State Party, but also of whether an opposing Party in practice adheres to the provisions of common Article 3.[232] Furthermore, common Article 3 is based on the principle of equality of the Parties to the conflict. It grants the same rights and imposes the same obligations on both the State and the non-State Party, all of which are of a purely humanitarian character.[233] This does not, however, imply combatant immunity for members of non-State

[230] Article 2(2) of Additional Protocol II does not limit the continuing protection of its Articles 5 and 6 after the end of the conflict to deprivations or restrictions of liberty for reasons related to the conflict *during* the conflict but grants it also for deprivations or restrictions of liberty for reasons related to the conflict *after* the conflict. Parties to a non-international armed conflict in the sense of common Article 3 that has come to an end may also want to consider granting such broad continuing protections under common Article 3.

[231] See e.g. David, p. 268.

[232] See also section F.1.c.

[233] Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4442. See also Sivakumaran, 2012, pp. 242–244; Bugnion, 2003b, p. 167; and Christopher Greenwood, 'The relationship between *ius ad bellum* and *ius in bello*', *Review of International Studies*, Vol. 9, No. 4, 1983, pp. 221–234, at 221.

armed groups as this concept is not as such applicable in non-international armed conflicts.[234]

b. Binding force of common Article 3 on non-State armed groups

539 Non-State armed groups are not 'High Contracting Parties' to the Geneva Conventions. In 1949, States decided that non-State entities could not become party to the Geneva Conventions. Nevertheless, it is today accepted that common Article 3 is binding on non-State armed groups, both as treaty and customary law.[235]

540 The wording of common Article 3, which differentiates between 'High Contracting Parties' and Parties to the conflict, clearly supports this: 'In the case of armed conflict not of an international character occurring in the territory of one of the *High Contracting Parties*, *each Party to the conflict* shall be bound to apply …' (emphasis added). During the negotiation of common Article 3, an amendment proposing a reference to the High Contracting Parties also in the second part of the sentence was rejected.[236]

541 The exact mechanism by which common Article 3 becomes binding on an entity that is not a High Contracting Party to the Geneva Conventions is the subject of debate.[237] Explanations include: that an entity claiming to be representing a State or parts of it, in particular by exercising effective sovereignty over it, enters into the international obligations of that State;[238] that following the ratification of the Geneva Conventions by a State, common Article 3 becomes part of domestic law and therefore binds all individuals under the State's jurisdiction, including members of a non-State armed group;[239] that common Article 3 and other humanitarian law treaties intended to bind non-State Parties to non-international armed conflicts are international treaty provisions lawfully creating obligations for third parties, similar to how treaties

[234] For a discussion of combatant immunity, see Introduction, para. 20, and the commentary on Article 85, para. 3634.

[235] For the customary law status of common Article 3, see e.g. ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, paras 218–219; ICTY, *Tadić* Decision on the Defence Motion on Jurisdiction, 1995, para. 98; *Naletilić and Martinović* Trial Judgment, 2003, para. 228; and ICTR, *Akayesu* Trial Judgment, 1998, paras 608–609.

[236] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 90, with a response by the ICRC; see, further, pp. 93–94 and 99–100.

[237] For an overview, see Sivakumaran, 2012, pp. 238–242, and 2015, pp. 415–431; Kleffner, 2011; Moir, pp. 52–58; Murray, pp. 101–131; and Dinstein, pp. 63–73.

[238] See e.g. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, pp. 51–52; *Commentary on the Second Geneva Convention*, ICRC, 1960, p. 34; *Commentary on the Third Geneva Convention*, ICRC, 1960, pp. 37–38; *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 37; Elder, p. 55; Schindler, p. 151; and Sivakumaran, 2015, pp. 422–423.

[239] This is often referred to as the doctrine of legislative jurisdiction. See e.g. Pictet (ed.), *Commentary on the Second Geneva Convention*, ICRC, 1960, p. 34; Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4444; Sivakumaran, 2015, pp. 418–419; Dinstein, p. 70; and Elder, p. 55. See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 94 (statement by Greece).

can, under certain circumstances,[240] create obligations for States not party to them;[241] that when a State ratifies a treaty, it does so on behalf of all individuals under its jurisdiction, who can therefore become the addressees of direct rights and obligations under international law;[242] that it 'derives from the fundamental nature of the rules [common Article 3] contains and from their recognition by the entire international community as being the absolute minimum needed to safeguard vital humanitarian interests';[243] and that non-State armed groups can also consent to be bound by common Article 3, for example through the issuance of a unilateral declaration or special agreement between Parties to an armed conflict.[244]

542 A variety of these legal theories have been advanced to explain how non-State armed groups are bound by common Article 3, but it is undisputed that the substantive provisions of common Article 3 bind all such armed groups when they are party to an armed conflict.

c. Binding force of common Article 3 on multinational forces

543 As noted earlier,[245] multinational forces can engage in activities that would make States or international organizations sending them a Party to a non-international armed conflict, whether in execution of their mandate or owing to factual developments. A distinction can be made between multinational operations conducted by a coalition of States not subject to the command and control of an international organization, on the one hand, and multinational operations conducted under the command and control of the United Nations or other international organizations, on the other hand.

544 In situations where multinational operations are conducted by a coalition of States not subject to the command and control of an international organization, the individual States participating in the multinational forces become Parties to the conflict.[246] Depending on whether the multinational forces become engaged against a State or a non-State Party, the law governing either international or non-international armed conflict is binding on the troop-contributing States. In the latter case, common Article 3 will be binding on those States' forces.

[240] See Vienna Convention on the Law of Treaties (1969), Articles 34–36.
[241] See Cassese, 1981, pp. 423–429, and Sivakumaran, 2015, pp. 419–420.
[242] See Sivakumaran, 2015, pp. 417–418; Antonio Cassese, 'La guerre civile et le droit international', *Revue générale de droit international public*, Vol. 90, 1986, pp. 553–578, at 567; Dinstein, p. 66; and Schindler, p. 151.
[243] See Bugnion, 2003a, p. 336, who also argues that the binding nature of common Article 3 'derives from international custom, the laws of humanity and the dictates of public conscience'. On this point, see also Sivakumaran, 2015, p. 424.
[244] See Sivakumaran, 2015, pp. 420–422, and Dinstein, pp. 70–71.
[245] See paras 445–447 of this commentary, as well as the commentary on Article 2, paras 278–285.
[246] For more details, see paras 411–413 of this commentary.

545 In situations where the organization within whose framework the multinational operation is carried out exercises command and control over such forces, it can become a Party to the armed conflict.[247] Since international organizations deploying multinational forces are not States and thus generally cannot become a Party to the Geneva Conventions or other humanitarian law treaties, these treaties are not as such binding on them. However, status of forces agreements (SOFAs) concluded between the United Nations and States hosting UN peace operations typically require the United Nations to ensure that its operation is conducted with 'full respect for the principles and rules of the international conventions applicable to the conduct of military personnel'.[248] With respect to forces under UN command and control, the applicability of certain 'fundamental principles and rules of international humanitarian law' to multinational forces has also been explicitly affirmed by the UN Secretary-General.[249]

546 Furthermore, it has come to be accepted that such organizations are bound by customary international law.[250] The International Court of Justice has stated that international organizations, including the United Nations, are subjects of international law and are bound by any obligations incumbent upon them under general rules of international law.[251]

547 In addition, as troop-contributing States do not normally relinquish all control over their forces to the organization deploying multinational forces, many

[247] It is also possible that in some circumstances, both the international organization and the States contributing troops are considered Parties to the armed conflict. For more details on this issue, see paras 445–447 of this commentary; the commentary on Article 2, paras 278–285; and Ferraro, 2013b, pp. 588–595.

[248] See e.g. The Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan concerning the United Nations Mission in South Sudan (UNMISS), Juba, 8 August 2011, paras 6(a) and (b). While such provisions are not included in the 'Model status-of-forces agreement for peace-keeping operations' as prepared by the UN Secretary-General at the request of the General Assembly (UN Doc. A/45/594, 9 October 1990), they have been included in relevant SOFAs since the UN concluded such an agreement with Rwanda in respect of the UN Assistance Mission in Rwanda (UNAMIR) on 5 November 1993; see United Nations *Treaty Series*, Vol. 1748, pp. 3–28.

[249] See e.g. the 1999 UN Secretary-General's Bulletin, which does not distinguish between international and non-international armed conflict.

[250] See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, p. 179; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980, para. 37; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*, Advisory Opinion, 1996, para. 25.

[251] In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*, Advisory Opinion, 1996, para. 25, the ICJ stated:

> [I]nternational organizations … do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers … The powers conferred on international organizations are normally subject of an express statement in their constituent instruments.

For a discussion of the implications of this principle for the applicability of humanitarian law to international organizations, see Kolb/Porretto/Vité, pp. 121–143; Naert, pp. 533–534; Shraga, 1998, p. 77; and Engdahl, p. 519.

States consider that these forces remain bound by their own State's humanitarian law obligations.[252]

2. 'as a minimum, the following provisions'

548 All Parties to a non-international armed conflict are bound to comply with the 'minimum' provisions listed in common Article 3. These fundamental obligations are automatically applicable in any non-international armed conflict as soon as it has come into existence.

549 As noted by common Article 3 itself, these provisions are only 'minimum' provisions.

550 While the States adopting common Article 3 in 1949 could not find agreement on making more or all provisions of the Geneva Conventions automatically applicable in non-international armed conflict,[253] they were nevertheless aware that the application of additional and more detailed rules might be desirable in such conflicts. They therefore agreed on the inclusion of paragraph 3 of common Article 3, according to which the 'Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions' of the Geneva Conventions.[254]

551 In addition to the fundamental obligations under common Article 3 and the option of special agreements, Parties to non-international armed conflict may also be bound by other humanitarian law treaties.[255] Furthermore, they are bound by customary humanitarian law applicable to non-international armed conflict as well as by obligations under international human rights law, within its scope of application. The question whether and to what extent human rights law applies to non-State armed groups is not settled. At a minimum, it seems accepted that armed groups that exercise territorial control and fulfil government-like functions thereby incur responsibilities under human rights law.[256]

[252] See UN Secretary-General's Bulletin (1999), Section 2, where it states that '[t]he present provisions do not … replace the national laws by which military personnel remain bound throughout the operation'. See also e.g. Netherlands, *Military Manual*, 2005, para. 1231 ('Naturally, the various countries participating in such an operation under the UN flag are bound by the customary law, treaties and conventions which they have signed and ratified.'), and Germany, *Military Manual*, 2013, para. 1405 ('Whether a UN mandate was issued or not does not affect the question of the applicability of LOAC [law of armed conflict]. Instead, the norms of international humanitarian law are directly applicable if they apply to the sending states in question and if there is an armed conflict in the country of deployment.')

[253] For more details, see section B.

[254] For details, see section K.

[255] In particular, by Additional Protocol II, depending on ratification, and provided that a particular non-international armed conflict fulfils the criteria for the applicability of that Protocol. For details, see the commentary on Additional Protocol II. See also the examples of other treaties noted in fn. 5 of this commentary.

[256] For an overview of the practice and debate on this issue, see e.g. Sivakumaran, 2012, pp. 95–99; Jean-Marie Henckaerts and Cornelius Wiesener, 'Human rights obligations of non-state armed groups: a possible contribution from customary international law?', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar,

E. Subparagraph (1): Persons protected

1. Introduction

552 Subparagraph (1) covers all '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause'. The article does not expand on these notions and this part of the article did not give rise to much discussion at the 1949 Diplomatic Conference. The protection afforded under this subparagraph requires that the person be in the power of a Party to the conflict (see section E.4).[257]

553 The protection of persons not or no longer participating in hostilities is at the heart of humanitarian law. The persons protected by common Article 3 are accordingly described by way of explicit delimitations: 'persons taking *no* active part in the hostilities, including members of armed forces who have *laid down* their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause' (emphasis added). Parties to a non-international armed conflict are under the categorical obligation to treat these persons humanely, in all circumstances and without any adverse distinction.

554 Nevertheless, outside common Article 3, humanitarian law contains a number of provisions that benefit persons during the time they are actively participating in hostilities. These include the general prohibition on the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering, and prohibitions on specific means and methods of warfare.[258]

2. Persons taking no active part in the hostilities

555 Common Article 3 protects '[p]ersons taking no active part in the hostilities'. These are first and foremost the civilian population, which typically does not take an active part in the hostilities.[259] Thus, civilians benefit from the protection of common Article 3, except for such time as they take an active part in

Cheltenham, 2013, pp. 146–169; Andrew Clapham, 'Focusing on Armed Non-State Actors', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, pp. 766–810, at 786–802; and Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability*, Ashgate, Farnham, 2016.

[257] For the persons protected by subparagraph (2) on the wounded and sick, see section I.3.b.

[258] These rules have been found to apply in non-international armed conflict as a matter of customary international law; see ICRC Study on Customary International Humanitarian Law (2005), in particular Rules 46, 64–65, 70, 72–74, 77–80 and 85–86.

[259] See also ICC Elements of Crimes (2002), elements common to all crimes under Article 8(2)(c) of the 1998 ICC Statute (describing persons protected by common Article 3 of the Geneva Conventions as: 'such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities').

hostilities. They are protected when and as soon as they cease doing so, including when they are 'placed *hors de combat* by sickness, wounds, detention, or any other cause'.[260] The civilian population also includes former members of armed forces who have been demobilized or disengaged.[261]

556 Second, persons taking no active part in the hostilities include non-combatant members of the armed forces, namely medical and religious personnel. As they must be exclusively assigned to medical and religious duties, they typically do not take an active part in hostilities.[262]

557 Third, as spelled out in common Article 3, persons taking no active part in hostilities include 'members of armed forces who have laid down their arms and those placed *hors de combat*'. This category is further discussed in section E.3.

558 The notion of active participation in hostilities is not defined in common Article 3, nor is it contained in any other provision of the 1949 Geneva Conventions or earlier treaties.[263] However, the differentiation between persons actively participating in hostilities and persons not or no longer doing so is a key feature of humanitarian law.

559 The notion of participation in hostilities is contained in the 1977 Additional Protocols, which provide that civilians enjoy protection against dangers arising from military operations 'unless and for such time as they take a direct part in hostilities'.[264] It has become widely accepted that 'active' participation in hostilities in common Article 3 and 'direct' participation in hostilities in the Additional Protocols refer to the same concept.[265]

560 The purpose of the reference to direct participation in hostilities in the Protocols is to determine when a civilian becomes a lawful target under humanitarian law during the conduct of hostilities. The scope and application

[260] For details on persons *hors de combat*, see section E.3.b. That the considerations on persons *hors de combat* apply to civilians who take an active part in hostilities follows from the link between 'those placed *hors de combat*' to 'persons taking no active part in the hostilities'. The French version is clearer as it repeats the term 'persons' ('Les personnes qui ne participent pas directement aux hostilités, y compris … les personnes qui ont été mises hors de combat …'). See also Kleffner, 2015, pp. 442–443.

[261] On disengagement from non-State armed groups, see ICRC, *Interpretive Guidance*, pp. 72–73.

[262] See also ICC Elements of Crimes (2002), elements common to all crimes under Article 8(2)(c) of the 1998 ICC Statute (describing persons protected by common Article 3 as: 'such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities').

[263] But see Article 15 of the Fourth Convention, providing for the possibility of Parties to an international armed conflict to establish neutralized zones for sheltering, among others, 'civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character'.

[264] See Additional Protocol I, Article 51(3), and Additional Protocol II, Article 13(3). See also ICRC Study on Customary International Humanitarian Law (2005), Rule 6.

[265] See e.g. ICTR, *Akayesu* Trial Judgment, 1998, para. 629, and ICRC, *Interpretive Guidance*, p. 43. The equally authentic French version of common Article 3 refers to 'personnes qui ne participent pas *directement* aux hostilités' (emphasis added).

of the notion of direct participation in hostilities is the subject of debate in the framework of the rules on the conduct of hostilities.[266]

561 Whichever view on the notion of direct participation in hostilities a Party to the conflict adopts for the purposes of its targeting decisions, as soon as a person ceases to take an active part in hostilities, for example when falling into the hands of the enemy, that person comes under the protective scope of common Article 3 and must be treated humanely.

562 Thus, any form of ill-treatment – such as torture or cruel, humiliating or degrading treatment – can never be justified because a person may have actively participated in hostilities in the past. There is no place for retribution under humanitarian law.

3. *Members of armed forces who have laid down their arms and those placed* hors de combat

a. *Members of armed forces*

563 The term 'members of armed forces' is not defined in either common Article 3 or in the Geneva Conventions more generally.[267]

564 In the context of common Article 3, the term 'armed forces' refers to the armed forces of both the State and non-State Parties to the conflict. This is implied by the wording of common Article 3, which provides that 'each Party to the conflict' must afford protection to 'persons taking no active part in the hostilities, including members of armed forces'.[268] Furthermore, common Article 3 does not refer to 'the' armed forces, which could suggest State armed forces alone, but rather to 'armed forces'.[269] Lastly, common Article 3 is built on a balance of obligations between all Parties to the conflict and requires that members of both State armed forces and non-State armed groups be treated humanely as soon as they lay down their arms or are otherwise placed *hors de combat*.[270]

[266] For the purpose of the principle of distinction in the conduct of hostilities, the ICRC has provided recommendations on the interpretation of the notion of direct participation in hostilities; see ICRC, *Interpretive Guidance*. For a discussion of this publication, see e.g. Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', *Harvard National Security Journal*, Vol. 1, 2010, pp. 5–44; *Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Study on targeted killings*, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, pp. 19–21; and 'Forum: The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law', *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 637–916. For further details, see the commentaries on Article 51 of Additional Protocol I and Article 13 of Additional Protocol II.

[267] It was only in 1977 that a definition of armed forces was included in humanitarian treaty law with respect to international armed conflict; see Additional Protocol I, Article 43. For a discussion of the meaning of the term in the context of international armed conflict, see the commentary on Article 4, section D.1.

[268] See also ICRC, *Interpretive Guidance*, p. 28.

[269] See also the equally authentic French version of common Article 3, referring to 'les membres *de* forces armées' and not 'les membres *des* forces armées' (emphasis added).

[270] See also Sassòli, 2006, p. 977.

565 The requirement of humane treatment does not, however, imply combatant immunity for members of non-State armed groups as this concept is not as such applicable in non-international armed conflict. Such persons may be prosecuted under domestic law for their participation in hostilities, including for acts that are not unlawful under humanitarian law. The last paragraph of common Article 3 confirms that the application of this article does not affect the legal status of the Parties to the conflict.

566 State armed forces first of all consist of a State's regular armed forces. However, the notion of State armed forces also includes other organized armed groups or units that are under a command responsible to the State Party to the non-international armed conflict.[271]

567 State armed forces traditionally consist of personnel with a combatant function and personnel with a non-combatant function, namely medical and religious personnel. As mentioned above, medical and religious personnel typically do not take an active part in hostilities and, while adhering to their non-combatant role, fall under the protective scope of common Article 3.[272]

568 For their part, non-State Parties to a non-international armed conflict do not have armed forces in the sense established under domestic law.[273] However, the existence of a non-international armed conflict requires the involvement of fighting forces on behalf of the non-State Party to the conflict that are capable of engaging in sustained armed violence, which requires a certain level of organization.[274] Such organized armed groups constitute the 'armed forces' of a non-State Party to the conflict in the sense of common Article 3.[275]

b. *Laying down arms or being placed* hors de combat

569 Common Article 3 refers to 'members of armed forces who have laid down their arms' separately from 'those placed *hors de combat* by sickness, wounds, detention, or any other cause'. What distinguishes members of armed forces 'who have laid down their arms' from 'those placed *hors de combat* by sickness, wounds, detention, or any other cause' is that the cessation of their involvement in the conflict is not the consequence of external factors that are out of

[271] This can include entities that may not fall under the definition of the armed forces under domestic law but that are either formally incorporated into them or factually assume the functions of regular armed forces, such as a national guard, customs, police or any other similar forces. See e.g. Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4462; ICRC, *Interpretive Guidance*, pp. 30–31; and Sivakumaran, 2012, p. 180.

[272] See para. 556 of this commentary.

[273] Even though, occasionally, they may include dissident armed forces of a State; see Additional Protocol II, Article 1(1).

[274] See section C.2.b.

[275] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 43; ICRC, *Interpretive Guidance*, pp. 27–36; and the commentaries on Articles 1(1) and 13 of Additional Protocol II.

their control, but involves a decision on their part to surrender.[276] The result of that decision, however, is the same as if they had been placed *hors de combat* by external factors: they are no longer engaged in the conflict. The individual laying down of arms grants protection under common Article 3; it is not required that the armed forces as a whole do so.[277]

570 The notion of *hors de combat* is not defined in common Article 3 or the Geneva Conventions more generally.

571 For the purpose of the conduct of hostilities, however, the effect and requirements of being '*hors de combat*' are defined in Additional Protocol I:

> 1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
> 2. A person is *hors de combat* if:
> (a) he is in the power of an adverse Party;
> (b) he clearly expresses an intention to surrender; or
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
>
> provided that in any of these cases he abstains from any hostile act and does not attempt to escape.[278]

This rule is part of customary law applicable in non-international armed conflict.[279]

572 The final part of this definition ('provided that in any of these cases he abstains from any hostile act and does not attempt to escape') explains why a person *hors de combat* must no longer be attacked. When a person abstains from hostile acts and does not attempt to escape, there is no longer a reason to harm that person. These conditions would therefore also seem relevant for common Article 3, determining from what moment a member of armed forces (or a civilian who is taking an active part in hostilities) is to be regarded as placed *hors de combat* and therefore protected under common Article 3.

[276] During the 1949 Diplomatic Conference, the formulation ultimately adopted, 'who have laid down their arms', was preferred over the proposed formulation 'and those who surrender'; see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 84, 90 and 100.

[277] In the equally authentic French version of common Article 3, the phrase 'members of armed forces who have laid down their arms' ('les membres de forces armées qui ont déposé les armes') can be understood as either referring to individual members of armed forces laying down their arms or as requiring armed forces as a whole to have laid down their arms in order for their members to benefit from the protections of common Article 3. However, the discussions at the 1949 Diplomatic Conference make clear that it was the first reading which was intended. The adoption of the English version in the present form, using 'who have laid down their arms', whereby 'who' can only relate to persons, was deliberate. A proposal to replace 'who' by 'which', 'to indicate that the armed forces as a whole must lay down their arms', was rejected. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 100.

[278] Additional Protocol I, Article 41.

[279] ICRC Study on Customary International Humanitarian Law (2005), Rule 47.

573 In particular, persons who are *hors de combat* by clearly expressing an intention to surrender are laying 'down their arms' in the sense of common Article 3 and come within the protective scope of the article.[280] Common Article 3 then notes the following other factors potentially rendering a person *hors de combat*: 'sickness, wounds, detention, or any other cause'. Sickness and wounds are typical incidences for members of armed forces during non-international armed conflict, as is detention, resorted to by both State and non-State Parties to the conflict.[281] Other causes of being *hors de combat* could, for example, be shipwreck, parachuting from an aircraft in distress, or falling or otherwise being in the power of a Party to the conflict – for example at a checkpoint – even if the situation may not yet be regarded as amounting to detention. The addition of 'any other cause' indicates that the notion of 'hors de combat' in common Article 3 should not be interpreted in a narrow sense.[282]

4. *Common Article 3 and the conduct of hostilities*

574 Common Article 3 does not address the conduct of hostilities. The substantive protections in common Article 3 themselves, for example the prohibitions on torture and hostage-taking, envision a certain level of control over the persons concerned: they are in the power of a Party to the conflict. This includes civilians living in areas under the control of a Party to the conflict but not with respect to actions by Parties governed by the rules on the conduct of hostilities. This reading finds support in the preparatory work for the Geneva Conventions and in military manuals and case law.[283] It is also supported in academic literature.[284]

[280] Persons who have been demobilized or disengaged can also be said to 'have laid down their arms', but when this has occurred before falling into the power of the enemy, they come under the protective scope of common Article 3 when falling into the power of the enemy because they are at that moment 'taking no active part in the hostilities'; see also para. 555 of this commentary.

[281] At the Diplomatic Conference, the term 'detention' in common Article 3 was preferred over the term 'captivity'. One delegation expressed the view that captivity 'implied the status of a prisoner of war and was incompatible with the idea of civil war' and suggested therefore the use of the term 'detention', while another delegation saw 'no difficulty in the use of the word "captivity" which meant "taking into custody" either by police or by opposing troops'; see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 94 and 100. On detention outside a criminal process, see section H.

[282] This was also the understanding of the drafters of the 2002 ICC Elements of Crimes; see Dörmann, p. 389.

[283] See e.g. *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 407–410 (statements by the United States, Canada, Mexico, France and Switzerland on the meaning of 'in the hands of' in Article 32 of the Fourth Convention, a provision which is explicitly compared to common Article 3 in those discussions); United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 215; and Inter-American Commission on Human Rights, *Case 11.137 (Argentina)*, Report, 1997, para. 176 (civilians 'are covered by Common Article 3's safeguards when they are captured by or otherwise subjected to the power of an adverse party').

[284] See Meron, 1991, p. 84; Pejic, 2011, pp. 203, 205–206 and 219 (common Article 3 protects persons in the 'power' of or 'captured'; deals with the 'protection of persons in enemy hands'); Melzer, p. 216 (with respect to the prohibition of murder); Yukata Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2009, p. 299

575 The only protection that has given rise to doubt in this regard is the prohibition of murder which has been found in some cases to apply to unlawful attacks in the conduct of hostilities.[285] Some authors support the view that common Article 3 contains some regulation of the conduct of hostilities.[286] If this were the case, the prohibition of murder would have to be interpreted in the light of the specific rules on the conduct of hostilities, in particular the rules on distinction, proportionality and precautions. A taking of life in compliance with the rules on the conduct of hostilities would not amount to murder under common Article 3.

576 In the view of the ICRC, it follows from the context of the 1949 Geneva Conventions in which common Article 3 is placed, however, that it was not intended to govern the conduct of hostilities.[287] Common Article 3 as ultimately adopted evolved from drafts proposing the application of the principles of the Geneva Conventions – or of the provisions of the Conventions as such – to non-international armed conflict. The primary concern of the Conventions is the protection of the victims of international armed conflicts in the power of a Party to the conflict, but not the regulation of the conduct of hostilities as such. The same should therefore apply for common Article 3, which was adopted to extend the essence of the Conventions to non-international armed conflicts.[288]

(common Article 3 applies to persons 'captured in armed conflict'; murder can only be committed in the law and order, rather than the hostilities, context); Knuckey, p. 456 (with respect to the prohibition of murder); and Dinstein, p. 134.

285 ICTY, *Strugar* Trial Judgment, 2005, dealing with an artillery attack against the old town of Dubrovnik inhabited by persons not taking an active part in hostilities. The Court found that the charges of the war crimes of murder and cruel treatment, as well as of attacks on civilians, were fulfilled; see paras 234–240, 260–261 and 277–283, with references to earlier case law. Compare further ICC, *Katanga* Trial Judgment, 2014, paras 856–879. See also Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, 26 February 1999, para. 41; Human Rights Council, *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/17/44, 12 January 2012, para. 146; and UN, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, paras 193, 206 and 242.

286 See e.g. Bond, p. 348; William H. Boothby, *The Law of Targeting*, Oxford University Press, 2012, p. 433; Cassese, p. 107; and Rogers, p. 301. For a more intermediate position, see Bothe/Partsch/Solf, p. 667, fn. 1.

287 This was also the understanding in 1977 during the drafting of what became Article 13 of Additional Protocol II, which prohibits attacks against the civilian population and civilians not taking a direct part in hostilities; see *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XV, p. 363: '[T]he only general international law with respect to non-international armed conflicts is Article 3 common to the four Geneva Conventions of 1949, which contains no provision pertinent to the subject-matter of this article of Protocol II.' See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, paras 4365 and 4776; Draper, 1965, pp. 84–85 (the Geneva Conventions 'adopted the solution of eschewing any direct attempt to legislate for the conduct of hostilities … the prohibitions relate to treatment outside of combat'); ICRC, *Interpretive Guidance*, p. 28; Pejic, 2011, p. 219; Gasser, p. 478; Meron, 1991, p. 84; Watkin, p. 271, with fn. 31; Zegveld, pp. 82–84; and Abresch, p. 748, with fn. 22.

288 For details, see section B.

577 That hostilities may lead to the death or injury of persons who are taking no active part in hostilities is a reality of non-international armed conflict, be it because such persons are unlawfully made the target of attacks or because they become incidental victims of attacks. However, common Article 3 is not suited to assessing the lawfulness of the conduct of hostilities, which is governed by specific rules of humanitarian law. For non-international armed conflict, these rules can be found in Additional Protocol II and customary international law.[289]

5. *The applicability of common Article 3 to all civilians and to a Party's own armed forces*

578 While many provisions of the Conventions, in particular the Third and Fourth Conventions, are limited to protection when in the power of the enemy,[290] some provisions are not so limited. In the First and Second Conventions, this is notably the case for the provision setting out the central protections owed to all wounded, sick and shipwrecked persons under each Convention: Article 12.[291]

579 The wording of common Article 3 indicates that it applies to all persons taking no active part in the hostilities, 'without any adverse distinction'.[292] It contains no limitation requiring a person taking no active part in hostilities to be in the power of the *enemy* in order to be protected under the article. Its protective scope therefore includes civilians and members of the armed forces of the Parties to the conflict who are taking no active part in the hostilities – be they a Party's own forces or allied with or opposing them.[293]

580 It is logical that civilians should enjoy the protection of common Article 3 regardless of whose power they are in. In practice, it is often impossible in non-international armed conflict to determine whether members of the general population not actively participating in hostilities are affiliated with one or other Party to the conflict. Unlike usually in international armed conflict,[294] objective criteria such as nationality cannot be resorted to.[295] Limiting protection under common Article 3 to persons affiliated or perceived to be affiliated with the opposing Party is therefore difficult to reconcile with the protective purpose of common Article 3.

[289] See, in particular, Additional Protocol II, Articles 13–17, and ICRC Study on Customary International Humanitarian Law (2005), Rules 1–2, 5–21, 42–48 and 53–54.
[290] See Third Convention, Article 4, and Fourth Convention, Article 4.
[291] See the commentary on Article 12 of the First Convention, paras 1337, 1368 and 1370, and the commentary on Article 12 of the Second Convention, paras 1369, 1414 and 1416.
[292] On the prohibition of adverse distinction, see section F.2.
[293] See Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, pp. 55 and 135, and Sivakumaran, pp. 247–248.
[294] For details, see the commentary on Article 4 of the Fourth Convention.
[295] For a discussion of nationality as a prohibited criterion for adverse distinction under common Article 3, see section F.2.b.

581 Another issue is whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party.[296] Examples would include members of armed forces who are tried for alleged crimes – such as war crimes or ordinary crimes in the context of the armed conflict – by their own Party and members of armed forces who are sexually or otherwise abused by their own Party.[297] The fact that the trial is undertaken or the abuse committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized as a 'minimum yardstick' in all armed conflicts and as a reflection of 'elementary considerations of humanity'.[298]

582 In many cases, of course, recourse to common Article 3 may not be necessary to make a Party to a conflict treat its own armed forces humanely, be it because a Party to a conflict will feel under a natural obligation to do so, because it will do so out of self-interest, or because, at least in the case of a State Party, domestic law and international human rights law require treatment at least equivalent to that of humane treatment in the sense of common Article 3.

583 Nevertheless, insofar as a specific situation has a nexus to a non-international armed conflict, as in the examples given above, all Parties to the conflict should, as a minimum, grant humane treatment to their own armed forces based on common Article 3.

F. Subparagraph (1): Fundamental obligations under common Article 3

1. The obligation of humane treatment

a. Introduction

584 The obligation of humane treatment is the cornerstone of the protections conferred by common Article 3. It is expressed in few words but is nonetheless fundamental. From it derive the specific prohibitions under common Article 3(1), subparagraph (1), and it serves to ensure that all persons not or no longer participating in hostilities are treated humanely by both State and non-State Parties to non-international armed conflicts.

[296] For a detailed discussion, see Kleffner, 2013c, and Sivakumaran, 2012, pp. 246–249.

[297] See ICC, *Ntaganda* Appeal Judgment, 2017, paras 65–68, confirming that members of armed forces are not categorically excluded from protection against war crimes of rape and sexual slavery committed against them by their own Party; see also *Katanga* Decision on the Confirmation of Charges, 2008, para. 248, noting that the use of child soldiers in hostilities 'can be committed by a perpetrator against individuals in his own party to the conflict'. But see SCSL, *Sesay* Trial Judgment, 2009, paras 1451–1457, holding that 'the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces'.

[298] See ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, paras 218–219.

585 Jean Pictet wrote in 1958 that the principle of humane treatment 'is in truth the leitmotiv of the four Geneva Conventions'.[299] For international armed conflict, the principle of humane treatment has been codified in the 1899 and 1907 Hague Regulations, the successive Geneva Conventions and Additional Protocol I.[300] For non-international armed conflict, however, it was codified for the first time in common Article 3 and was subsequently reaffirmed in Additional Protocol II.[301]

b. Humane treatment

586 Humane treatment of persons protected under common Article 3 is not merely a recommendation or a moral appeal. As evident from the use of the word 'shall', it is an obligation of the Parties to the conflict under international law.

587 Despite this, the precise meaning of 'humane treatment' is not defined either in common Article 3 or in any other provision of humanitarian treaty law.[302] However, this is not a defect of these provisions. The meaning of humane treatment is context-specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as their age, social, cultural religious or political background and past experiences. In addition, there is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways. Sensitivity to the individual's inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment under common Article 3.[303]

[299] Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 204.

[300] See Hague Regulations (1899), Article 4; Hague Regulations (1907), Article 4; Geneva Convention on the Wounded and Sick (1929), Article 1; and Geneva Convention on Prisoners of War (1929), Article 2. Today, see, in particular, First and Second Conventions, Article 12; Third Convention, Article 13; Fourth Convention, Article 27; and Additional Protocol I, Articles 10 and 75.

[301] Formal rules to this effect date back to the Lieber Code, which was promulgated in the context of a non-international armed conflict, the American Civil War; see Lieber Code (1863), Articles 4 and 76. See also Brussels Declaration (1874), Article 23. Article 73 of the Lieber Code is a notable illustration of the distinctive importance attributed to humane treatment: 'All officers, when captured, must surrender their side arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery or *approbation of his humane treatment of prisoners before his capture*' (emphasis added). See Article 4 of Additional Protocol II, the first provision of Part II of the Protocol, which is entitled 'Humane treatment'. According to Article 5(1) and (3) of Additional Protocol II, the imperative of humane treatment also applies to persons 'deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', and to persons 'whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict'.

[302] For a discussion of the requirement of humane treatment of prisoners of war, see the commentary on Article 13, section C.1.

[303] For more information on the differing impacts of armed conflict, see e.g. Coomaraswamy; Gardam; Lindsey, 2001 and 2005; or parallel information in UN Security Council, *Report of the Secretary-General on women, peace and security*, UN Doc. S/2002/1154, 16 October 2002.

588 Including a comprehensive definition of humane treatment in common Article 3 would have created a framework that risked being too narrow and inflexible, and as such incapable of ensuring humane treatment in situations where unforeseen or particular circumstances, such as climatic conditions, cultural sensitivities or individual needs, have to be taken into account. At the same time, giving no guidance at all on the meaning of humane treatment could have left Parties to an armed conflict with too much latitude, leading to interpretations incompatible with the objectives of this fundamental rule.[304] The approach chosen for common Article 3 was to make the imperative of humane treatment its central axis, while illustrating it with examples of prohibited acts. Accordingly, common Article 3 categorically requires that persons not or no longer taking an active part in hostilities be treated humanely in all circumstances, adding that 'to this end' violence to life and person, taking of hostages, outrages upon personal dignity and the passing of sentences without a fair trial 'are and shall remain prohibited at any time and in any place'.

589 The formulation 'to this end' makes clear that the obligation of humane treatment is the substantive core of common Article 3. Humane treatment has a meaning of its own, beyond the prohibitions listed. These prohibitions are merely specific examples of conduct that is indisputably in violation of the humane treatment obligation.[305]

590 In accordance with the ordinary meaning of the word 'humane', what is called for is treatment that is 'compassionate or benevolent'[306] towards the persons protected under common Article 3. This is more directly reflected in the French version of the text in which the obligation is formulated as requiring that persons protected under common Article 3 'are treated with humanity' ('traitées avec humanité').

591 State practice has called for treatment that respects a person's inherent dignity as a human being.[307] The same understanding of humane treatment is

Both women and men need to be actively involved in the planning and implementation of activities carried out for their benefit. It is therefore important to include the perspectives of men and women of different ages and backgrounds in the identification and assessment of these issues. For guidance, see e.g. Cecilia Tengroth and Kristina Lindvall, *IHL and gender – Swedish experiences*, Swedish Red Cross and Swedish Ministry for Foreign Affairs, Stockholm, 2015, Recommendations, and chapter 6, Checklist – a gender perspective in the application of IHL.

[304] See e.g. ICTY, *Aleksovski* Trial Judgment, 1999, para. 49; see also Elder, p. 61, and Sivakumaran, 2012, pp. 257–258.

[305] This approach was reaffirmed in Article 4(1)–(2) of Additional Protocol II. See also Sivakumaran, 2012, pp. 257–258.

[306] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 693, adding 'inflicting the minimum of pain' as another element.

[307] See e.g. Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment, 2007, section III-D-5: 'La garantía general de trato humano provee el principio guía general subyacente a las convenciones de Ginebra, en el sentido de que su objeto mismo es la tarea humanitaria de proteger al individuo en tanto persona, salvaguardando los derechos que de allí se derivan.' ('The general guarantee of humane treatment provides the overall guiding principle behind the Geneva Conventions, in the sense that the object itself is the humanitarian task of protecting the individual as a person, safeguarding the rights derived from it.') See also United States,

also reflected in international case law.[308] Persons protected under common Article 3 must never be treated as less than fellow human beings and their inherent human dignity must be upheld and protected.

592 Furthermore, the ways States have elaborated on the obligation of humane treatment in their military manuals, codes of conduct and policy documents may give further indications of what the obligation entails, in particular with regard to persons deprived of their liberty. These documents not only list practices incompatible with the notion of humane treatment but provide examples of what the requirement of humane treatment entails. Such examples include treatment with all due regard to the person's sex,[309] respect for convictions and religious practices,[310] provision of adequate food and drinking water[311] as well as clothing,[312] safeguards for health and hygiene,[313] provision of suitable medical care,[314] an entitlement to sleep,[315] protection from violence and against the dangers of the armed conflict,[316] and appropriate contacts with the outside world.[317] Depending on the circumstances, the

Naval Handbook, 2017, paras 11.1–11.2: 'Humane Treatment … All detainees shall: … f. Be respected as human beings.'

308 See e.g. ICTY, *Aleksovski* Trial Judgment, 1999, para. 49.

309 See e.g. Australia, *Manual of the Law of Armed Conflict*, 2006, paras 9.48 and 9.49; Canada, *Code of Conduct*, 2002, p. 2-9, para. 5; Djibouti, *Manual on International Humanitarian Law*, 2004, p. 23; Turkey, *LOAC Manual*, 2001, p. 49; and Sri Lanka, *Military Manual*, 2003, para. 1603.

310 See e.g. Australia, *Manual of the Law of Armed Conflict*, 2006, para. 9.58; Chad, *IHL Manual*, 1996, p. 28 (version before Chad ratified Additional Protocol II); Nepal, *Army Handbook*, 2011, p. 6; Sri Lanka, *Military Manual*, 2003, para. 1222; Turkey, *LOAC Manual*, 2001, p. 158; United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 2-7, para. 211(i); and United States, *Naval Handbook*, 2017, para. 11.2.

311 See e.g. Chad, *IHL Manual*, 1996, p. 28; Denmark, *Military Manual*, 2016, pp. 500–501; Sri Lanka, *Military Manual*, 2003, para. 1221; Turkey, *LOAC Manual*, 2001, p. 158; United Kingdom, *Joint Doctrine Captured Persons*, 2015, pp. 2-5–2-6, paras 211(b) and (c); and United States, *Naval Handbook*, 2017, para. 11.2.

312 See e.g. United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 2-6, para. 211(f), and United States, *Naval Handbook*, 2017, para. 11.2.

313 See e.g. Chad, *IHL Manual*, 1996, p. 28; Sri Lanka, *Military Manual*, 2003, para. 1228; Turkey *LOAC Manual*, 2001, p. 158; and United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 2-6, para. 211(d).

314 See e.g. Canada, *Prisoner of War Handling Manual*, 2004, p. 1B-4; Chad, *IHL Manual*, 1996, p. 28; Denmark, *Military Manual*, 2016, p. 513; Sri Lanka, *Military Manual*, 2003, para. 1228; Turkey, *LOAC Manual*, 2001, pp. 159–160; United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 2-7, para. 211(h): and United States, *Naval Handbook*, 2017, para. 11.2.

315 See e.g. New Zealand, *Military Manual*, 2019, Vol. 4, p. 12-14, para. 12.3.7; United States, Department of Defense, *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement*, 2009, p. 29.

316 See e.g. Chad, *IHL Manual*, 1996, p. 28; Denmark, *Military Manual*, 2016, p. 476; Sri Lanka, *Military Manual*, 2003, para. 1228; and Turkey, *LOAC Manual*, 2001, p. 158.

317 See e.g. Chad, *IHL Manual*, 1996, p. 28; Nepal, *Army Handbook*, 2011, p. 3; Sri Lanka, *Military Manual*, 2003, para. 1228; Turkey, *LOAC Manual*, 2001, pp. 159–160; United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 2-7, para. 211(l); and United States, Department of Defense (DoD), *DoD Detainee Program*, Directive No. 2310.01E, 19 August 2014, section 3(b)(1) 'Policy'. See also Copenhagen Process: Principles and Guidelines (2012), paras 2, 9 and 10.

conditions of detention at sea may also violate the requirement of humane treatment, in particular in case of prolonged detention at sea.[318]

593 While common Article 3 does not set out a specific rule with respect to contacts with the outside world, Additional Protocol II requires that persons deprived of their liberty for reasons related to an armed conflict 'be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary'.[319] Since the adoption of the Protocol, State practice has developed as regards the need to ensure that victims of armed conflict who fall into the hands of the other Party do not go missing and that they are able to maintain family links. It has become customary international law that the personal details of persons deprived of their liberty must be recorded and that they must be allowed to correspond with their families.[320]

594 Because of the importance of informing the families of the fate and whereabouts of their relatives, the obligations to respect family life and to search for and account for missing persons have also crystallized into rules of customary international law applicable in non-international armed conflict.[321]

c. In all circumstances

595 According to common Article 3, the obligation of humane treatment applies 'in all circumstances', a formula that also appears in other provisions of humanitarian treaty law.[322]

596 The formula emphasizes that the obligation of humane treatment is absolute and knows no exceptions. No circumstances justify deviating from the obligation.[323] Even though, as pointed out above, the implementation of the obligation, for example the provision of adequate food or medical care, might differ

[318] See also Hafetz, p. 244, and Modarai *et al.*, pp. 834–835.

[319] Additional Protocol II, Article 5(2)(b).

[320] See ICRC Study on Customary International Humanitarian Law (2005), Rules 123 and 125. Correspondence with families may be subject to reasonable conditions relating to frequency and the need for censorship by the authorities.

[321] *Ibid.* Rules 105 and 117. In practice, the national information bureaux established pursuant to Article 122 of the Convention may be given a role in this regard.

[322] With reference to the treatment, respect and protection of specific categories of persons 'in all circumstances', see e.g. First Convention, Articles 12 and 24; Second Convention, Article 12; Third Convention, Article 14; Fourth Convention, Article 27; Additional Protocol I, Articles 10 (2) and 75(1); and Additional Protocol II, Articles 4(1) and 7(2). The formula also appears in common Article 1 of the Geneva Conventions and Article 1(1) of Additional Protocol I, obligating the High Contracting Parties to respect and to ensure respect for the Conventions or the Protocol 'in all circumstances'. In the context of the conduct of hostilities, an obligation to observe the rules ensuring the protection of civilians against the dangers arising from military operations 'in all circumstances' is contained in Article 51(1) of Additional Protocol I and Article 13 of Additional Protocol II.

[323] See e.g. United States, *Manual on Detainee Operations*, 2014, p. I-1: 'Inhumane treatment of detainees is prohibited by the Uniform Code of Military Justice, domestic and international law, and DOD [Department of Defense] policy. *Accordingly, there is no exception to or deviation from this humane treatment requirement*.' (Emphasis added.) See also United States, *Naval Handbook*, 2017, paras 11.1–11.2.

depending on the specific circumstances of the armed conflict,[324] the treatment provided to a person protected under common Article 3 must never be less than humane, as the minimum standard of treatment to be accorded to all fellow human beings.[325]

597 The phrase 'in all circumstances' has also been read as a confirmation that military necessity may not be invoked as an argument against fulfilling the obligation of humane treatment under common Article 3.[326] Some provisions of humanitarian law explicitly incorporate considerations of military necessity, balancing them against the demands of humanity. Where a provision does not do so, it must be presumed that the balance between military necessity and humanity has already been incorporated into the rule and thus military necessity may not be invoked to justify non-compliance with it.[327] The obligation of humane treatment in common Article 3 is not subject to any explicit qualification based on military necessity. Military necessity arguments therefore do not justify acts or omissions inconsistent with the requirement of humane treatment.

598 The phrase 'in all circumstances' also reinforces the non-reciprocal nature of humanitarian law, including common Article 3. A Party to an armed conflict is bound by its humanitarian law obligations irrespective of the conduct of an opposing Party. The non-observance of its obligations by one Party to an armed conflict does not relieve another Party of its obligations.[328] Such an understanding is supported by the drafting history of common Article 3. As discussed in section B, early drafts of this article required reciprocity in order for humanitarian law to

[324] See e.g. Côte d'Ivoire, *Teaching Manual*, 2007, Vol. IV, p. 14; United Kingdom, *Joint Doctrine Captured Persons*, 2015, pp. 2-5–2-7, paras 211(b), (c) and (h), and p. 2-13, para. 218(e); and United States, *Naval Handbook*, 2017, para. 11.1. See also Elder, p. 60.

[325] See e.g. ICTY, *Aleksovski* Trial Judgment, 1999, paras 168, 173 and 182, and in the context of international armed conflict, Eritrea-Ethiopia Claims Commission, *Prisoners of War, Eritrea's Claim*, Partial Award, 2003, paras 58, 65, 68 and 138.

[326] See Kleffner, 2013a, pp. 326–327, commenting on 'in all circumstances' in Article 12 of the First Convention.

[327] In the words of the US Military Tribunal at Nuremberg in the *Hostages case*, Judgment, 1948, pp. 66–67, '[m]ilitary necessity or expediency do not justify a violation of positive rules'. See, further, Kalshoven/Zegveld, pp. 32–33 and 84; O'Connell, pp. 36–38; and Rogers, pp. 7–10.

[328] See Condorelli/Boisson de Chazournes, p. 19; Moir, p. 60; and Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, paras 49–51, commenting on 'in all circumstances' in Article 1 of Additional Protocol I. See also ICTY, *Kupreškić* Trial Judgment, 2000, para. 517:

> [T]he *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity.

See in this respect also Article 60(5) of the 1969 Vienna Convention on the Law of Treaties, which precludes States from suspending or terminating for material breach any treaty provision 'relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.

be applicable between the Parties to a non-international armed conflict.[329] However, the reciprocity requirement was dropped from the text and the opposite was expressed through the 'in all circumstances' formula.

599 In the context of non-international armed conflict, international law contains no rules on the resort to force in the sense of *jus ad bellum*. The phrase 'in all circumstances' reaffirms that the lawfulness of one's own resort to force or the unlawfulness of an opponent's use of force do not justify violations of the law governing the way in which such use of force is conducted.[330] While the national laws of a State usually prohibit violent acts against governmental authorities or between persons on its territory, States generally have a right to use force in order to restore domestic public security, law and order.[331] Irrespective of this right, once a situation of violence reaches the threshold of a non-international armed conflict, all Parties to that conflict must comply with their obligations under humanitarian treaty and customary law. Whether or not a State or a non-State Party to a non-international armed conflict has a right to engage in that conflict under domestic law is of no relevance to its obligations under humanitarian law. Humanitarian law applicable to non-international armed conflict was developed precisely to regulate such situations of violence, in particular to protect all persons not or no longer actively participating in hostilities. If the applicability of humanitarian law was dependent on the lawfulness or unlawfulness of a resort to force, humanitarian law could not fulfil this purpose.[332]

600 Lastly, it is important to point out that 'in all circumstances' is not to be understood as meaning that common Article 3, as a treaty law provision, applies in all armed conflicts, i.e. in international and non-international armed conflicts alike. Such a reading would be inconsistent with the specific scope of application of common Article 3, which is limited to non-international armed conflict. Nevertheless, the fundamental rules of humanitarian law set forth in

[329] See e.g. draft article 2(4) of the draft convention relative to the treatment of prisoners of war, adopted by the 17th International Conference of the Red Cross in Stockholm in 1948 and used as the basis for negotiations at the 1949 Diplomatic Conference:

> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the *Parties to the conflict* shall be bound to implement the provisions of the present Convention, *subject to the adverse party likewise acting in obedience thereto*. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.

Draft Conventions adopted by the 1948 Stockholm Conference, pp. 51–52. For more details, see section B.

[330] See Bugnion, 2003b, p. 173, with reference to the 'in all circumstances' formula in common Article 1.

[331] For more details, see Bugnion, 2003b, pp. 169–170. For an overview of the debate on whether Article 51 of the 1945 UN Charter also includes a right of States to use force in self-defence against non-State actors operating from the territory of another State, see Tams.

[332] For more details, see Bugnion, 2003b, pp. 186 and 197, and Sassòli/Bouvier/Quintin, pp. 114–121.

common Article 3 are today recognized as a 'minimum yardstick' that is binding in all armed conflicts as a reflection of 'elementary considerations of humanity'.[333] In addition, however, there are more detailed rules of treaty law that prescribe humane treatment of persons comparable in their vulnerability to those protected under common Article 3 during international armed conflict.[334]

2. *The prohibition of adverse distinction*

a. Introduction

601 The persons protected under common Article 3(1), subparagraph (1), are in all circumstances to be treated humanely 'without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'.

602 This obligation is reaffirmed by Additional Protocol II.[335]

603 The insistence that certain rules of humanitarian law be applied without distinction can be traced back to the origins of the codification of humanitarian law applicable to international armed conflict.[336] Article 4 of the 1929 Geneva Convention on Prisoners of War formulated the considerations that are at the basis of the prohibition of adverse distinction in humanitarian law: 'Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them.' As such, differentiation in treatment is not prohibited *per se* and may even be required under humanitarian law. The clause in common Article 3 reflects this approach. Any form of differentiation that is not justified by substantively different situations and needs is prohibited.[337]

[333] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, paras 218–219.

[334] For the imperative of humane treatment of the wounded, sick and shipwrecked, see Article 12(2) of the First and Second Conventions; of prisoners of war, see Article 13(1) of the Third Convention; of civilian protected persons, see Article 27(1) of the Fourth Convention; and of persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Geneva Conventions or under Additional Protocol I, see Article 75(1) of Additional Protocol I.

[335] Article 2(1) of Additional Protocol II in fact extends the prohibition of adverse distinction to the application of the Protocol as a whole. With respect to humane treatment 'without any adverse distinction' of persons not or no longer taking a direct part in hostilities, see Article 4(1) of Additional Protocol II. For more details, see the commentaries on Articles 2 and 4 of Additional Protocol II.

[336] See Geneva Convention (1864), Article 6; Geneva Convention (1906), Article 1; Hague Convention (X) (1907), Article 11; and Geneva Convention on the Wounded and Sick (1929), Article 1. For more details, see the commentary on Article 12 of the First Convention, section F.1.c.

[337] For international armed conflict, the prohibition of adverse distinction is laid down for the wounded, sick and shipwrecked in Article 12 of the First and Second Conventions and in Article 9 of Additional Protocol I; for prisoners of war, in Article 16 of the Third Convention; for the whole of the populations of countries in conflict, in Article 13 of the Fourth Convention; for

b. Adverse distinction

604 Common Article 3 requires humane treatment 'without any adverse distinction'. This phrase reinforces the absolute character of the obligation of humane treatment under common Article 3.

605 Common Article 3 lists 'race, colour, religion or faith, sex, birth or wealth' as prohibited grounds for adverse distinction among protected persons. As is evident from the addition of the concluding phrase 'or any other similar criteria', this list is not exhaustive but only illustrative. Adverse distinction founded on other grounds, such as age, state of health, level of education or family connections of a person protected under common Article 3 would therefore equally be prohibited.

606 Further prohibited grounds for adverse distinction were explicitly added in Article 2(1) of Additional Protocol II: language, political or other opinion, and national or social origin, again accompanied by the concluding phrase 'or any other similar criteria'.[338] These grounds, too, would constitute 'other similar' adverse criteria prohibited under common Article 3.

607 Unlike other provisions of humanitarian law,[339] common Article 3 does not list 'nationality' as a prohibited criterion.[340] This might be seen as merely a reflection of the consideration that in non-international armed conflict questions of nationality arise less frequently than in international armed conflict. However, this is not necessarily the case; persons of varying nationalities may well be involved in or affected by a non-international armed conflict. While recognizing this, the Working Party preparing the draft of the final text of common Article 3 at the 1949 Diplomatic Conference nevertheless decided not to include nationality as a criterion, given that it might be perfectly legal for a government to treat insurgents who are its own nationals differently in an adverse sense from foreigners taking part in a civil war. The latter might be

protected persons, in Article 27 of the Fourth Convention; and for persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Geneva Conventions or under Additional Protocol I, in Article 75 of the Protocol.

[338] See Additional Protocol II, Article 2(1). These criteria are very similar to those in Article 2(1) of the 1966 International Covenant on Civil and Political Rights: 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. For an explanation of these criteria, see e.g. Nowak, pp. 47–57. For prohibited adverse distinction criteria listed for international armed conflict, see First Convention and Second Conventions, Article 12; Third Convention, Article 16; Fourth Convention, Article 27(3); and Additional Protocol I, Articles 9(1) and 75(1).

[339] For international armed conflict, see First and Second Conventions, Article 12, and Third Convention, Article 16.

[340] Article 2(1) of Additional Protocol II, like Articles 9(1) and 75(1) of Additional Protocol I and Article 2(1) of the 1966 International Covenant on Civil and Political Rights, refers to 'national origin', thereby introducing a nationality-related concept, albeit not nationality as such; see e.g. Sivakumaran, 2012, p. 259. In the context of the International Covenant, however, national origin has been interpreted as overlapping with the criteria of race, colour and ethnic origin, rather than as referring to nationality as such, with nationality falling under 'other status'; for an overview of the discussion, see e.g. Nowak, pp. 54–55, with further references.

looked on as being guilty of a worse offence than nationals of the country concerned or, conversely, they might be treated less severely or merely subject to deportation.[341]

608 Not including 'nationality' in the list validly takes into account the right of States to impose sanctions under domestic law on persons engaging in a non-international armed conflict. That, however, has no bearing on common Article 3's imperative of humane treatment without any adverse distinction. Common Article 3 is strictly humanitarian in character. It does not limit a State's right to suppress a non-international armed conflict or to penalize involvement in such a conflict. It is focused exclusively on ensuring that every person not or no longer actively participating in the hostilities is treated humanely. In the domestic judicial assessment of a non-international armed conflict, nationality may be regarded as an aggravating or extenuating circumstance, but it cannot be regarded as affecting in any way the humanitarian law obligation of humane treatment. To subject foreign nationals in a non-international armed conflict to inhumane treatment is incompatible with common Article 3.[342] While, for the reasons described above, the 1949 Diplomatic Conference did not list nationality as a prohibited criterion, it must therefore be understood as falling within the concept of 'other similar criteria' under common Article 3.[343]

609 In order to be fully effective, the prohibition of 'any adverse distinction' under common Article 3 must be understood to comprise not only measures that single out certain persons protected under common Article 3 for adverse treatment, but also seemingly neutral measures that have the effect of adversely affecting certain persons. For persons falling within the protective scope of common Article 3, it makes no difference whether they are directly selected for inhumane treatment, or whether their inhumane treatment is the

[341] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 94.

[342] Similar considerations apply to 'political or other opinion', explicitly listed in Article 2(1) of Additional Protocol II as a prohibited ground for adverse distinction and subsumable under common Article 3's prohibition of adverse distinction on 'any other similar criteria'. The 'political or other opinion' of a person protected under common Article 3, leading for example to active participation in a non-international armed conflict or allegiance with one of the Parties to the conflict, may be of consequence under domestic law. It is, however, of no relevance for the absolute obligation of the Parties to the conflict under common Article 3 to treat that person humanely. Unlike nationality, the question of political or other opinion was not specifically discussed at the 1949 Diplomatic Conference.

[343] In not listing nationality as a prohibited criterion, common Article 3 is similar to Article 27(3) of the Fourth Convention prohibiting adverse distinction against protected persons. Considering that the applicability of certain provisions of the Fourth Convention in fact depend on a person's nationality, the 1949 Diplomatic Conference omitted nationality from the list of criteria in Article 27(3): 'the word "nationality" had been omitted in Article 25 [ultimately adopted as Article 27] because internment or measures restricting personal liberty were applied to enemy aliens precisely on grounds of nationality'; see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 641. However, as in the case of common Article 3, the absolute obligation of humane treatment contained in Article 27(1) of the Fourth Convention exists independently of these considerations. For more details, see the commentary on Article 27 of the Fourth Convention.

indirect consequence of general policies.[344] When adopting general policies, a Party to a non-international armed conflict will therefore need to take into account the potential consequences of these policies on all persons protected under common Article 3 who are affected by them.

c. Non-adverse distinction

610 As indicated above, common Article 3, like other provisions of humanitarian law, does not prohibit distinctions as such.

611 It does not prohibit non-adverse distinctions, i.e. distinctions that are justified by the substantively different situations and needs of persons protected under common Article 3.

612 This allows for differentiated treatment that in fact serves the purpose of realizing a person's humane treatment. While the legal obligation of humane treatment under common Article 3 is absolute; the ways to achieve such treatment must be adapted to a person's specific needs.[345] Humane treatment accorded to one person is not necessarily sufficient to constitute humane treatment for another person. Therefore, common Article 3 does not prohibit differentiated treatment that is actually necessary in order to achieve humane treatment.[346]

613 Common Article 3 does not specifically mention possible grounds that justify differential treatment among the persons it protects. Such grounds can, however, be found in many other provisions of humanitarian law. In particular, a person's state of health, age or sex is traditionally recognized as justifying, and in fact requiring, differential treatment.[347] In order to ensure survival, for example, the gravity of a person's wounds or illness may necessitate prioritization of that person's medical treatment over the treatment of

[344] An example of the latter would be the distribution of standardized food rations to persons deprived of their liberty, which, while generally of adequate nutritional value, might be inadequate or culturally intolerable for some.

[345] In the context of international human rights law, this is commonly referred to as the concept of substantial rather than formal equality. In *Thlimmenos* v. *Greece*, the European Court of Human Rights held with regard to Article 14 of the 1950 European Convention on Human Rights that '[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'; *Thlimmenos* v. *Greece*, Judgment, 2000, para. 44.

[346] See e.g. Pejic, 2001, p. 186.

[347] For non-international armed conflict, see Article 4(3) of Additional Protocol II: 'Children shall be provided with the care and aid they require.' For international armed conflict, see e.g. First and Second Conventions, Article 12(3)–(4); Third Convention, Article 16; Fourth Convention, Article 27(2)–(3); and Additional Protocol I, Articles 76 and 77–78. See also the provisions regulating the pronouncement and execution of the death penalty on persons under the age of 18, pregnant women, and mothers of dependent infants/young children: Additional Protocol II, Article 6(4); Fourth Convention, Article 68(4); and Additional Protocol I, Articles 77(5) and 76 (3). See also Rona/McGuire, p. 195.

other, less severely injured or ill persons.[348] The age of a person deprived of liberty may require appropriate treatment, for example in terms of the kind of food or medical care provided; and pregnant or nursing women in detention may similarly require tailored nourishment and medical care or adjustments in the organization and equipment of their accommodation.[349]

614 Grounds for non-adverse distinction could also be found in an awareness of how the social, economic, cultural or political context in a society forms roles or patterns with specific statuses, needs and capacities that differ among men and women of different ages and backgrounds. Taking such considerations into account is no violation of the prohibition of adverse distinction, but rather contributes to the realization of humane treatment of all persons protected under common Article 3.[350]

615 A Party to a non-international armed conflict can always choose to grant treatment above the standard of humane treatment. There exists, however, no legal obligation in this respect in common Article 3.

616 In any event, treatment above the standard of humane treatment that is accorded to some persons must under no circumstances lead to less than humane treatment of all other persons protected under common Article 3(1), subparagraph (1).

G. Subparagraph (1): Acts prohibited under common Article 3

1. Introduction

617 This subparagraph is introduced by the sentence '[t]o this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons'. The first words of this sentence – '[t]o this end' – reaffirm that the prohibitions set out in this subparagraph aim at ensuring the humane treatment of all persons falling within its protective scope.

618 In addition, the words 'are and shall remain prohibited' reaffirm that the prohibitions are absolute and admit no exception.

619 The phrase 'at any time and in any place whatsoever' refers to the geographical and temporal scope of application of common Article 3.[351] The reference to 'the above-mentioned persons' refers to the persons protected by this subparagraph.[352]

[348] For more details, see section I.3.d. In the context of international armed conflict, see also the commentaries on Article 12 of the First and Second Conventions, section G, and on Article 30 of the Third Convention, paras 2232 and 2250.

[349] See also the commentary on Article 16, paras 1747 and 1754–1755.

[350] In permitting and in fact requiring distinction that is not adverse but favourable to the persons concerned, so that they fully benefit from humane treatment, humanitarian law is not dissimilar to human rights law in its approach to non-discrimination; see e.g. UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10 November 1989, paras 7–8 and 13.

[351] For details, see sections C.3 and C.4.

[352] For details, see section E.

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2. *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*

a. *Violence to life and person*

i. Introduction

620 Violence to life and person is listed first among the acts specifically prohibited in common Article 3. The prominent position given to this prohibition underlines its fundamental importance in ensuring humane treatment.

621 Common Article 3 protects persons not or no longer participating in hostilities.[353] It is therefore evident why the article outlaws violence to their lives and persons. Such violence has no bearing on the enemy's military operations or capacities. There is no military need to violate their persons.[354] The gratuitous taking of human life or violation of a person's physical or mental well-being is irreconcilable with the imperative of humane treatment that is at the basis of common Article 3.

622 The prohibition of violence to life and person is reaffirmed in Article 4(2)(a) of Additional Protocol II.

623 Common Article 3 illustrates the prohibition of violence to life and person by listing '*in particular* murder of all kinds, mutilation, cruel treatment and torture' (emphasis added) as being prohibited. This means that acts omitted from the list of specific examples can still fall under the more general prohibition. An act that, for example, does not amount to torture or cruel treatment can still be prohibited as an act of violence to person.

624 International and regional human rights treaties, within their respective fields of application, require respect for the right to life[355] and the right to integrity of the person.[356] In general, these instruments exclude these rights from derogation in time of public emergency.[357]

[353] For details, see section E.

[354] As succinctly formulated in the preamble to the 1868 St Petersburg Declaration, albeit in the context of international armed conflict, 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; ... for this purpose it is sufficient to disable the greatest possible number of men'.

[355] See e.g. International Covenant on Civil and Political Rights (1966), Article 6; European Convention on Human Rights (1950), Article 2; American Convention on Human Rights (1969), Article 4; and African Charter on Human and Peoples' Rights (1981), Article 4.

[356] Some human rights instruments explicitly protect the right to integrity of the person, while other instruments only address it in the form of the more specific prohibitions of torture or cruel, inhuman or degrading treatment or punishment. See International Covenant on Civil and Political Rights (1966), Article 7; European Convention on Human Rights (1950), Article 3; American Convention on Human Rights (1969), Article 5; and African Charter on Human and Peoples' Rights (1981), Article 4.

[357] See e.g. International Covenant on Civil and Political Rights (1966), Article 4; European Convention on Human Rights (1950), Article 15; and American Convention on Human Rights (1969), Article 27. Note, however, that according to Article 15(2) of the European Convention, derogations from the right to life are not prohibited 'in respect of deaths resulting from lawful acts of war'; compare also, in this context, Article 2(2)(c) of the European Convention. The 1981 African Charter on Human and Peoples' Rights contains no derogation clause.

ii. Protected values: life and person

625 The first value protected by the prohibition of violence to life and person is human life. This prohibition underlines the all-encompassing importance of respect for the lives of persons benefiting from the protection of common Article 3. Where not even their lives are respected, the provision's ultimate purpose, humane treatment, is unattainable.[358]

626 The second value protected by this prohibition is the human 'person'. In the English text, common Article 3 does not indicate whether this comprises only the integrity of the physical person or also a person's mental integrity. In the equally authentic French version, the wording is more specific ('atteintes portées à la vie et à l'intégrité corporelle'), suggesting that a person's mental integrity is excluded from the protective scope of the prohibition of violence to person in common Article 3. Article 4(2) of Additional Protocol II expressly proscribes 'violence to the … health and *physical or mental* well-being of persons' (emphasis added). On the one hand, this could be read as a clarification that violence to person also includes violence to a person's mental integrity or, on the other hand, it can be seen as an indication that violence to mental integrity was intentionally excluded from common Article 3's prohibition of violence to person.[359] Today, however, it is widely accepted that the prohibition of torture and cruel treatment under common Article 3 – specific examples of the prohibition of violence to person – includes acts detrimental to the mental integrity of the person.[360]

iii. Prohibited behaviour: violence to life and person

627 Common Article 3 prohibits 'violence' to the lives and persons of the individuals coming under its protection; it does not define the meaning of 'violence'.[361]

628 The prohibition of violence to life and person evidently covers violence that results in the death or injury of a person protected under common Article 3. The transgression of the prohibition of violence to life and person is not however contingent on whether death of the victim takes place. In many instances, an act of violence to life that does not lead to the death of the victim will, at least, lead to some bodily or mental harm, thereby falling under the prohibition of violence to person.

629 Considering the purpose of the prohibition of violence to life and person – to ensure humane treatment of persons not or no longer actively participating in

[358] See Nowak, p. 121, with further references, noting in the context of international human rights law: 'The right to life has properly been characterized as the supreme human right, … since without effective guarantee of this right, all other rights of the human being would be devoid of meaning.'

[359] See Sandoz/Swinarski/Zimmermann, para. 4532, as well as Zimmermann/Geiss, para. 888.

[360] For details, see sections G.2.d and G.2.e.

[361] For a further discussion of the meaning of the term 'violence', see the commentary on Article 13, section D.2.

hostilities – the prohibition must also be understood as comprising omissions under certain circumstances. For example, letting persons under one's responsibility starve to death by failing to provide food, or letting such persons die or continue to suffer from wounds or sickness by failing to provide medical care, while having the possibility to do so, is irreconcilable with the requirement of humane treatment.[362]

630 As is manifest from the acknowledgement of 'executions' in subparagraph (1)(d), common Article 3 does not prohibit the death penalty against persons falling within its protective scope. However, it does require that a death sentence be passed and an execution carried out only following a 'previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.[363] A death sentence or execution not respecting these strict requirements would not only be in violation of subparagraph (1)(d), but would also constitute unlawful violence to life within the meaning of subparagraph (1)(a).[364]

631 Common Article 3 does not contain a specific prohibition on corporal punishment. Such an explicit prohibition is, however, included in Article 4(2)(a) of Additional Protocol II, which prohibits 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as *cruel treatment such as* torture, mutilation or *any form of corporal punishment*' (emphasis added). This could be read as an indication that corporal punishment required an explicit prohibition in Additional Protocol II and is not prohibited under common Article 3.[365] Common Article 3 does, however, contain the specific prohibition of cruel treatment, the category under which Article 4(2)(a) of Additional Protocol II mentions corporal punishment as an example. In addition, provided that it fulfils the specific requirements of, for example, mutilation or torture, corporal punishment would also be prohibited through these prohibitions contained in common Article 3.[366]

[362] On the issue of omission, see the commentary on Article 130, para. 5219.
[363] For more details, see section G.5.
[364] From the perspective of international armed conflict, see Dörmann, 2003, pp. 40–41, noting, as regards the war crime of 'wilful killing' under Article 8(2)(a)(i) of the 1998 ICC Statute, that the following behaviours have been held to constitute war crimes: '[K]illing in the absence of a (fair) trial .... The decision for and execution of an unlawful death penalty, which means contrary especially to Arts. 100–2, 107 GC III [Third Geneva Convention] with respect to prisoners of war, and Arts. 68, 71, 74, 75 GC IV [Fourth Geneva Convention] with respect to civilians, ... also constitute cases of wilful killing.'
[365] The drafting history of Article 4 of Additional Protocol II might support this conclusion: unlike other parts of Article 4(2)(a) of the Protocol, the inclusion of the reference to corporal punishment gave rise to debate at the 1974–1977 Diplomatic Conference, with some delegations preferring a prohibition of 'any form of bodily harm', arguing that corporal punishment would include imprisonment and noting that corporal punishment was 'a means of punishment recognized in many national legislations'; see, in particular, *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. VIII, pp. 421–429, paras 5 and 12, and Vol. X, pp. 49–50, paras 146–147, and pp. 103–104.
[366] In the context of international armed conflict, an explicit prohibition of corporal punishment of protected persons was already included in Article 46 of the 1929 Geneva Convention on

b. Murder

632 The first specific example of 'violence to life and person' listed in common Article 3 is 'murder of all kinds'. The prohibition of murder is reaffirmed in Article 4(2)(a) of Additional Protocol II. It is also part of customary international law.[367]

633 Neither common Article 3 nor other provisions of humanitarian law define 'murder'. It has been stated that '[m]urder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation.'[368] However, conceptions of the notion of murder vary in national laws, influenced by national criminal-law tradition.[369] It is therefore useful to note that common Article 3 prohibits murder 'of all kinds'. This indicates that the prohibition of murder in common Article 3 is not to be interpreted narrowly.

634 Violations of common Article 3, including 'murder' of persons not or no longer actively participating in hostilities, have consistently been prosecuted under Article 3 of the 1993 ICTY Statute (Violations of the laws or customs of war).[370] According to the ICTY, 'there can be no line drawn between "wilful killing" and "murder" which affects their content',[371] the only difference being that 'under Article 3 of the Statute the offence need not have been directed against a "protected person" but against a person "taking no active part in the hostilities"'.[372] This approach was reaffirmed in the 2002 ICC Elements of Crimes, which, for the war crimes of 'wilful killing' in international armed conflict and 'murder' in non-international armed conflict, adopted substantively identical elements of crimes, except for the victims of the crimes.[373] International case law on 'wilful killing' can therefore be consulted for the meaning of 'murder' and vice versa.[374]

635 Based on the above, the following elements of the prohibition of 'murder' under common Article 3 can be identified:

– It is prohibited to kill, or cause the death of, a person protected under common Article 3(1).[375]

Prisoners of War, and subsequently in Article 87 of the Third Convention, Article 32 of the Fourth Convention and Article 75(2)(a)(iii) of Additional Protocol I.

367 ICRC Study on Customary International Humanitarian Law (2005), Rule 89.

368 See ILC Draft Code of Crimes against the Peace and Security of Mankind (1996), p. 48, commenting on 'murder' as a crime against humanity.

369 For an overview of some systems, see e.g. Horder.

370 See e.g. ICTY, *Mucić* Trial Judgment, 1998, para. 316.

371 *Ibid*. para. 422.

372 ICTY, *Kordić and Čerkez* Trial Judgment, 2001, para. 233.

373 See ICC Elements of Crimes (2002), Article 8(2)(a)(i) and (c)(i).

374 For more details, see the commentary on Article 130, section D.1.

375 See e.g. ICTY, *Mucić* Trial Judgment, 1998, para. 424; *Jelisić* Trial Judgment, 1999, para. 35; *Blaškić* Trial Judgment, 2000, para. 153; *Kordić and Čerkez* Appeal Judgment, 2004, paras 36–37; *Blagojević and Jokić* Trial Judgment, 2005, para. 556; *Limaj* Trial Judgment, 2005, para. 241; *Krajišnik* Trial Judgment, 2006, para. 715; *Mrkšić* Trial Judgment, 2007, para. 486; *Dragomir Milošević* Appeal Judgment, 2009, para. 108; *Milutinović* Trial Judgment, 2009, paras 137–138; *Gotovina* Trial Judgment, 2011, para. 1725; *Đorđević* Trial Judgment, 2011, para. 1708;

– Prohibited as 'murder' is the intentional killing or causing of death of such persons, as well as the reckless killing or causing of their death. Death that is purely accidental or an unforeseeable consequence of a person's negligent act or omission does not fall under the prohibition of 'murder'.[376] In many situations, such as deprivation of liberty, persons protected under common Article 3 are under the complete control of a Party to a conflict and are therefore dependent on that Party for their survival. The creation or tolerance of unhealthful conditions of detention might therefore be regarded as a reckless or intentional act or omission.[377]
– Both acts and omissions are prohibited.[378] For instance, the failure to provide persons protected by common Article 3 who are under one's responsibility with sufficient food or medical care, while having the possibility to do so, leading to their death by starvation, can also fall under the prohibition of murder under common Article 3.[379]

636 The concept of murder in common Article 3 does not, however, apply to killing during the conduct of hostilities.[380] The legality of such killing has to be

Perišić Trial Judgment, 2011, para. 102; ICTR, *Ndindiliyimana* Trial Judgment, 2011, para. 2143; *Nyiramasuhuko* Trial Judgment, 2011, para. 6165; *Nizeyimana* Trial Judgment, 2012, para. 1552; SCSL, *Brima* Trial Judgment, 2007, paras 688–690; *Fofana and Kondewa* Trial Judgment, 2007, para. 146; *Sesay* Trial Judgment, 2009, para. 142; *Taylor* Trial Judgment, 2012, paras 412–413; and ICC, *Bemba* Trial Judgment, 2016, paras 91–97. For more details, see the commentary on Article 130, section D.1.

[376] See e.g. ICTY, *Mucić* Trial Judgment, 1998, paras 437 and 439; *Blaškić* Trial Judgment, 2000, para. 153; *Kordić and Čerkez* Trial Judgment, 2001, para. 229; *Naletilić and Martinović* Trial Judgment, 2003, para. 248; *Stakić* Trial Judgment, 2003, para. 587; *Brđanin* Trial Judgment, 2004, para. 386; and *Kordić and Čerkez* Appeal Judgment, 2004, para. 36. See also Dörmann, 2016, p. 329–331, commenting on Article 8(2)(a)(i) of the 1998 ICC Statute. For more details, see the commentary on Article 130, section D.1.b.

[377] See Dörmann, 2003, p. 43, referring, among others, to United Kingdom, Military Court at Brunswick, *Gerike case*, Trial, 1946, pp. 76–81, in which several defendants charged with committing a war crime were found guilty, 'in that they at Velpke, Germany, between the months of May and December, 1944, in violation of the laws and usages of war, were concerned in the killing by wilful neglect of a number of children, Polish Nationals'.

[378] This is independent of the question whether the violation of the prohibition will lead to international criminal responsibility. Individual criminal responsibility for omission has been recognized by international courts and tribunals. See e.g. ICTY, *Mucić* Trial Judgment, 1998, para. 424; *Blaškić* Trial Judgment, 2000, para. 153; *Kordić and Čerkez* Trial Judgment, 2001, para. 229; *Blagojević and Jokić* Trial Judgment, 2005, para. 556; *Limaj* Trial Judgment, 2005, para. 241; *Krajišnik* Trial Judgment, 2006, para. 715; *Mrkšić* Trial Judgment, 2007, para. 486; *Dragomir Milošević* Appeal Judgment, 2009, para. 108; *Milutinović* Trial Judgment, 2009, paras 137–138; *Đorđević* Trial Judgment, 2011, para. 1708; *Gotovina* Trial Judgment, 2011, para. 1725; *Perišić* Trial Judgment, 2011, para. 102; ICTR, *Nyiramasuhuko* Trial Judgment, 2011, para. 6165; *Nizeyimana* Trial Judgment, 2012, para. 1552; SCSL, *Brima* Trial Judgment, 2007, paras 688–690; *Fofana and Kondewa* Trial Judgment, 2007, para. 146; *Sesay* Trial Judgment, 2009, para. 142; and *Taylor* Trial Judgment, 2012, paras 412–413.

[379] See the commentary on the grave breach of 'wilful killing' in Article 130, section D.1. The ECCC found an accused guilty of the grave breach of wilful killing as detainees died 'as the result of omissions known to be likely to lead to death and as a consequence of the conditions of detention imposed upon them'; see *Kaing* Trial Judgment, 2010, para. 437.

[380] For more details, see section E.4. See also Knuckey, pp. 452–456.

assessed on the basis of the specific rules on the conduct of hostilities, in particular the rules on distinction, proportionality and precautions.

c. Mutilation

637 The second specific example of prohibited 'violence to life and person' is mutilation. This prohibition is a long-standing rule of humanitarian law.[381] It is also included in other provisions of the Third and Fourth Conventions and reaffirmed in the 1977 Additional Protocols.[382] The prohibition is now part of customary international law.[383] There is no indication in law or derived from practice that the term 'mutilation' has a different meaning in international and non-international armed conflict.[384]

i. Definition of mutilation

638 Mutilation is not specifically defined in the Geneva Conventions or the Additional Protocols. The Conventions and Protocols use both the terms 'physical mutilation' and 'mutilation'.[385] In its ordinary meaning, to 'mutilate' is defined as to 'injure or damage severely, typically so as to disfigure'.[386] The term mutilation thus refers to an act of physical violence. Hence, the terms 'mutilation' and 'physical mutilation' must be understood to have synonymous meanings.[387]

639 The ICC Elements of Crimes provides that mutilation consists 'in particular' of 'permanently disfiguring the person or persons' or 'permanently disabling or removing an organ or appendage'.[388] This definition is followed in the case law of the Special Court for Sierra Leone.[389] There does not, however, seem to exist at present any national or international case law to further interpret the terms 'mutilation', 'permanent disfigurement' or 'disabling or removal' as used in the Elements of Crimes.

640 The term 'permanent' injury used in the Elements of Crimes should be understood in its ordinary meaning as 'lasting or remaining unchanged

[381] See e.g. Lieber Code (1863), Articles 16 and 44 (prohibiting maiming) and Article 56 (prohibiting mutilation).
[382] See Third Convention, Article 13(1); Fourth Convention, Article 32; Additional Protocol I, Articles 11(2)(a) and 75(2)(a)(iv); and Additional Protocol II, Article 4(2)(a).
[383] ICRC Study on Customary International Humanitarian Law (2005), Rule 92.
[384] See Dörmann, 2003, pp. 231 and 484.
[385] The Conventions and Protocols use the term 'mutilation', the exception being Article 13(1) of the Third Convention and Article 11(2)(a) of Additional Protocol I, which use the term 'physical mutilation(s)'.
[386] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 945.
[387] See Dörmann, 2012, pp. 230 and 397, and Zimmerman/Geiss, p. 551.
[388] ICC Elements of Crimes (2002), Article 8(2)(b)(x)-1, (c)(i)-2 and (e)(xi)-1. For a commentary on these elements, see Dörmann, 2012, pp. 229–233, 396–397 and 482–484. See also La Haye, 2001a and b, pp. 164–166 and 208–209.
[389] See SCSL, *Brima* Trial Judgment, 2007, para. 724, and *Sesay* Trial Judgment, 2009, para. 180, and Appeal Judgment, 2009, para. 1198.

indefinitely, or intended to be so; not temporary'.[390] This implies that it would not be necessary for the injury to last forever.[391]

641 The term 'disfiguring' used in the Elements of Crimes should also be understood in its ordinary meaning as spoiling someone's appearance.[392] To 'spoil', in turn, requires a certain degree of severity.[393]

642 Practices documented in contemporary armed conflicts illustrate conduct that qualifies as mutilation. These include such acts as amputating hands or feet,[394] cutting off other body parts,[395] mutilation of sexual organs,[396] or carving someone's body.[397] Other examples cited include taking out a person's eye, knocking out teeth, injuring internal organs or scarring a face with acid.[398]

ii. Exception

643 Mutilation may be justified only on strict medical grounds, namely if it is conducive to improving the state of health of the person concerned, such as the amputation of a gangrenous limb. Although this exception is not explicitly stated in common Article 3, any other interpretation would be inconsistent with the article's object and purpose, as it would conflict with the obligation to care for the wounded and sick. This conclusion is reinforced by reference to the

[390] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 1068.

[391] See also United States, *Manual for Military Commissions*, 2010, Part IV, para. 5(14)(c), which considers the offence of mutilation to be complete 'even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery'.

[392] See *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 410 (to 'disfigure' is defined as to 'spoil the appearance of').

[393] See *ibid.* p. 1395 ('spoil' is defined as 'diminish or destroy the value or quality of'). See SCSL, *Sesay* Trial Judgment, 2009, para. 179 ('mutilation is a particularly egregious form of prohibited violence'); ICTR, *Kayishema and Ruzindana* Trial Judgment, 1999, para. 108 (mutilation amounts to 'serious bodily harm'), and Appeal Judgment, 2001, para. 361 (some types of harm are more severe than others, for instance mutilation); *Akayesu* Trial Judgment, 1998, paras 706–707 (mutilation inflicts 'serious' bodily harm); and Canada, Superior Court, Criminal Division, Province of Quebec, *Munyaneza case*, Judgment, 2009, para. 88 (mutilation is recognized as an act 'causing serious physical harm'). See also United States, *Manual for Military Commissions*, 2010, Part IV, para. 5(14)(c):

> A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature.

[394] See e.g. SCSL, *Koroma* Indictment, 2003, para. 31.

[395] See e.g. ICTR, *Kajelijeli* Trial Judgment, 2003, paras 935–936, and Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996.

[396] See e.g. ICTR, *Bagosora* Trial Judgment, 2008, para. 2266; *Kajelijeli* Trial Judgment, 2003, paras 935–936; and ICTY, *Tadić* Trial Judgment, 1997, paras 45 and 237; UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Colombia (1–7 November 2001)*, UN Doc. E/CN.4/2002/83/Add.3, para. 42; and Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996.

[397] See e.g. SCSL, *Koroma* Indictment, 2003, para. 31.

[398] See United States, *Manual for Military Commissions*, 2010, Part IV, para. 5(14)(c).

Third Convention and Additional Protocol I, which explicitly spell out this exception.[399]

644 The ICC Elements of Crimes, for the elements adopted for the war crime of mutilation, also provides for the exception when the conduct is 'justified by the medical, dental or hospital treatment of the person or persons concerned [or] carried out in such person's or persons' interests'.[400] The exception is confirmed in the case law of the Special Court for Sierra Leone.[401]

645 This is the only exception. Consent may never justify an act of mutilation. This is stated explicitly in Article 11(2) of Additional Protocol I. It is also reflected in the ICC Elements of Crimes, which specifies that the consent of the victim is not a defence.[402]

646 Furthermore, persons protected by common Article 3 may not be subjected to mutilation as part of a punishment under domestic law, as this exception is not foreseen in common Article 3 or in humanitarian law in general.

iii. Mutilation of dead bodies

647 The prohibition of mutilation in common Article 3 applies only to the living and does not extend to the mutilation of corpses. The protection from *permanent* disfigurement or loss of an organ or appendage necessarily presupposes that the victim is a living human being at the time of the prohibited act. Hence, the object and purpose of the prohibition of mutilation in common Article 3 does not relate to the dead. The mutilation of dead bodies is, however, prohibited under common Article 3 as it constitutes an outrage upon personal dignity.[403] It is also a distinct prohibition under customary international law.[404]

d. Cruel treatment

i. Introduction

648 Cruel treatment is the third specific example of prohibited violence to life and person. This prohibition is a long-standing rule of humanitarian law.[405] It is also included in other provisions of the Third and Fourth Conventions and reaffirmed in Additional Protocol II.[406] The prohibition is now part of customary international law.[407] International and regional human rights treaties,

[399] See Third Convention, Article 13(1), and Additional Protocol I, Article 11(1)–(2).
[400] ICC Elements of Crimes (2002), Article 8(2)(c)(i)-2, Element 2. See also La Haye, 2001b, p. 209.
[401] See SCSL, *Brima* Trial Judgment, 2007, para. 725, and *Sesay* Trial Judgment, 2009, para. 181.
[402] See ICC Elements of Crimes (2002), fn. 46 pertaining to Article 8(2)(b)(x)-1, Element 3, and fn. 69 pertaining to Article 8(2)(e)(xi)-1, Element 3. The omission of this footnote in relation to Article 8(2)(c)(i) might be 'a drafting error', according to Dörmann, 2003, p. 396.
[403] See section G.4.
[404] See ICRC Study on Customary International Humanitarian Law (2005), Rule 113.
[405] See e.g. Lieber Code (1863), Article 16; see also Articles 11 and 56.
[406] See Third Convention, Article 87; Fourth Convention, Article 118; and Additional Protocol II, Article 4(2)(a).
[407] See ICRC Study on Customary International Humanitarian Law (2005), Rule 90.

within their respective fields of application, list the prohibition of cruel treatment as non-derogable.[408]

649 In addition to cruel treatment, common Article 3 prohibits torture and outrages upon personal dignity – all of these terms are sometimes referred to as various forms of 'ill-treatment'. These prohibitions are similar, but not identical, and are addressed separately below in the order in which they appear in common Article 3.

650 The distinction between the terms 'cruel treatment', 'torture' and 'outrages' is of no consequence, however, in terms of their prohibition, and the textual ordering in no way suggests an ascending or descending scale of prohibitory effect. Common Article 3 absolutely prohibits all these forms of ill-treatment in all circumstances of non-international armed conflict.[409] No grounds, be they political, economic, cultural or religious, can justify any form of prohibited treatment; nor can such treatment be justified on the grounds of national security, including fighting terrorism or insurgency. Authorizing torture or other forms of ill-treatment based on prevailing circumstances is contrary to the absolute nature of the prohibitions, dilutes the prohibitory effect of common Article 3, and increases the risk of subsequent violations. Indeed, this is a proverbial door that must remain locked; use of these forms of ill-treatment in any circumstances tends to induce the search for justifications to engage in prohibited conduct, making the escalation of these practices almost unavoidable (the so-called 'slippery slope' argument). It may also undermine respect for common Article 3 among the Parties to the conflict, as it may signal to them that these prohibitions are qualified, while they are absolute under common Article 3 (see also the phrase 'the following acts are and shall remain prohibited at any time and in any place whatsoever').

ii. Definition of cruel treatment

651 The Geneva Conventions and Additional Protocols do not define cruel treatment.[410]

[408] See International Covenant on Civil and Political Rights (1966), Article 7; European Convention on Human Rights (1950), Article 3; American Convention on Human Rights (1969), Article 5(2); and African Charter on Human and Peoples' Rights (1981), Article 5.

[409] Similarly, international human rights law absolutely prohibits all forms of ill-treatment; this prohibition also applies in situations of emergency, such as war or the threat of war. See International Covenant on Civil and Political Rights (1966), Article 4; European Convention on Human Rights (1950), Article 15; American Convention on Human Rights (1969), Article 27; and Convention against Torture (1984), Article 2(2).

[410] Human rights instruments also do not define cruel treatment, although a link is established in two instruments between the prohibition of cruel treatment and respect for the inherent dignity of the human person. See American Convention on Human Rights (1969), Article 5(2) ('All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'), and African Charter on Human and Peoples' Rights (1981), Article 5 ('Every individual shall have the right to respect for the dignity inherent in a human being.').

652 The ICTY concluded that the prohibition of cruel treatment in common Article 3 'is a means to an end, the end being that of ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely'.[411] As a result, the ICTY defined cruel treatment as:

> treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.[412]

653 Hence, the Tribunal does not differentiate between 'cruel treatment' as prohibited in common Article 3 and 'inhuman treatment' as a grave breach of the Geneva Conventions.[413] The ICC Elements of Crimes follows the same approach.[414] Thus the terms 'cruel' and 'inhuman' treatment can be used interchangeably. For more details on 'inhuman treatment' as a grave breach in international armed conflict, see the commentary on Article 130, section D.3.

654 To qualify as cruel (or inhuman) treatment, an act must cause physical or mental suffering of a serious nature. Unlike for torture, no specific purpose is required for cruel treatment. As far as the seriousness of the mental or physical suffering is concerned, the ICTY considers that 'whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis'.[415] This interpretation mirrors that of human rights bodies and texts.[416]

655 In order to assess the seriousness of the suffering, the individual circumstances of each case have to be considered, both the objective elements related to the severity of the harm and the subjective elements related to the condition of the victim. Cruel treatment frequently does not take the form of an isolated act. It can be committed in one single act, but can also result from a combination or

[411] ICTY, *Tadić* Trial Judgment, 1997, para. 723.

[412] ICTY, *Delalić* Trial Judgment, 1998, para. 551. see also *Naletilić and Martinović* Trial Judgment, 2003, para. 246; *Kordić and Čerkez* Trial Judgment, 2001, para. 256; *Blaškić* Trial Judgment, 2000, paras 154–155; *Limaj* Trial Judgment, 2005, para. 231; *Orić* Trial Judgment, 2006, para. 351; *Haradinaj* Trial Judgment, 2008, para. 126; *Mrkšić* Trial Judgment, 2007, para. 514; *Lukić and Lukić* Trial Judgment, 2009, para. 957; and *Tolimir* Trial Judgment, 2012, para. 853. The ICRC policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty of 9 June 2011 follows the same definition; see *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 547–562, fn. 1.

[413] See ICTY, *Delalić* Trial Judgment, 1998, paras 550–552 ('cruel treatment is treatment that is inhuman'); see also *Kordić and Čerkez* Trial Judgment, 2001, para. 265, and *Blaškić* Trial Judgment, 2000, para. 186.

[414] See ICC Elements of Crimes (2002), Article 8(2)(a)(ii)-2 (War crime of inhuman treatment) and (c)(i)-3 (War crime of cruel treatment). The elements of crimes for the war crime of cruel treatment read in part: '1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.' For a commentary, see Dörmann, 2003, pp. 398–401; see also pp. 63–70 (inhuman treatment).

[415] ICTY, *Limaj* Trial Judgment, 2005, para. 232, confirmed in *Orić* Trial Judgment, 2006, para. 352; *Mrkšić* Trial Judgment, 2007, para. 517; *Lukić and Lukić* Trial Judgment, 2009, para. 957; and *Tolimir* Trial Judgment, 2012, para. 854.

[416] For more details, see Droege, 2007, pp. 521–522, and Doswald-Beck, 2011, pp. 196–199.

accumulation of several acts which, taken individually may not amount to cruel treatment.[417] According to the ICTY, these include 'the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health'.[418] The suffering caused by the cruel treatment does not need to be lasting, as long as it is 'real and serious'.[419] But the fact that a treatment has long-term effects may be relevant to establishing the seriousness of the act.[420]

656 Specific acts that have been considered cruel by the ICTY include the lack of adequate medical attention,[421] inhumane living conditions in a detention centre,[422] beatings,[423] attempted murder,[424] the use of detainees to dig trenches at the front under dangerous circumstances,[425] and the use of human shields.[426]

657 Examples of cruel treatment gleaned from the practice of human rights bodies and standards include: certain methods of punishment, especially corporal punishment,[427] certain methods of execution,[428] the imposition of the

[417] See European Court of Human Rights, *Dougoz* v. *Greece*, Judgment, 2001, para. 46, and *Iovchev*. v. *Bulgaria*, Judgment, 2006, para. 137; and UN Committee against Torture, *Consideration of reports submitted by States parties under Article 19 of the Convention: Israel*, UN Doc. A/52/44, 10 September 1997, para. 257.

[418] ICTY, *Krnojelac* Trial Judgment, 2002, para. 131; see also *Hadžihasanović* Trial Judgment, 2006, para. 33; *Orić* Trial Judgment, 2006, para. 352; *Martić* Trial Judgment, 2007, para. 80; *Delić* Trial Judgment, 2008, para. 51; *Lukić and Lukić* Trial Judgment, 2009, para. 957; and *Tolimir* Trial Judgment, 2012, para. 854. Not all of these judgments mention the full list of factors to be taken into account.

[419] ICTY, *Krnojelac* Trial Judgment, 2002, para. 131. See also *Martić* Trial Judgment, 2007, para. 80, and *Lukić and Lukić* Trial Judgment, 2009, para. 957.

[420] See ICTY, *Vasiljević* Trial Judgment, 2002, para. 235.

[421] See ICTY, *Mrkšić* Trial Judgment, 2007, para. 517; see also Inter-American Court of Human Rights, *Tibi* v. *Ecuador*, Judgment, 2004, para. 157, and European Court of Human Rights, *Koval* v. *Ukraine*, Judgment, 2006, para. 82.

[422] See ICTY, *Delalić* Trial Judgment, 1998, paras 554–558 and 1112–1119, confirmed in *Orić* Trial Judgment, 2006, para. 352. See also *Hadžihasanović* Trial Judgment, 2006, para. 35. For conditions of detention, see Droege, 2007, pp. 535–541, and Doswald-Beck, 2011, pp. 205–214.

[423] See ICTY, *Jelisić* Trial Judgment, 1999, paras 42–45, confirmed in *Orić* Trial Judgment, 2006, para. 352; see also *Hadžihasanović* Trial Judgment, 2006, para. 35.

[424] See ICTY, *Vasiljević* Trial Judgment, 2002, para. 239, confirmed in *Orić* Trial Judgment, 2006, para. 352.

[425] See ICTY, *Blaškić* Trial Judgment, 2000, para. 713, confirmed in *Orić* Trial Judgment, 2006, para. 352.

[426] See ICTY, *Blaškić* Trial Judgment, 2000, para. 716, confirmed in *Orić* Trial Judgment, 2006, para. 352.

[427] International humanitarian law absolutely prohibits the use of corporal punishment. See Third Convention, Articles 87(3), 89 and 108; Fourth Convention, Articles 32 and 118–119; Additional Protocol I, Article 74; and Additional Protocol II, Article 4. See also UN Human Rights Committee, *Osbourne* v. *Jamaica*, Views, 2000, para. 9.1; Inter-American Court of Human Rights, *Caesar* v. *Trinidad and Tobago*, Judgment, 2005, paras 67–89; and African Commission on Human and Peoples' Rights, *Doebbler* v. *Sudan*, Decision, 2003, paras 42–44.

[428] See UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 31.

death penalty after an unfair trial,[429] involuntary sterilization,[430] gender-based humiliation such as shackling women detainees during childbirth,[431] and the use of electroshock devices to restrain persons in custody.[432] Such acts would also amount to violations under common Article 3.

658 As indicated by the definition of cruel treatment, the suffering need not be physical. Mental suffering in itself can be of such a serious nature as to qualify as cruel treatment.[433] This understanding of cruel treatment also derives from the inseparable link between the prohibition of cruel treatment and the absolute requirement of humane treatment, which is not confined to preserving a person's physical integrity. For instance, serving as a human shield may inflict such mental suffering as to constitute cruel treatment.[434] Other examples from ICTY decisions include threats to life,[435] being forced to bury a fellow detainee,[436] and random beating of and shooting at prisoners.[437] Human rights bodies have found the following instances of mental suffering to constitute cruel treatment: threats of torture,[438] witnessing others being ill-treated,[439] raped[440] or executed.[441]

659 In this respect, it is important to note that the element of 'serious attack on human dignity' was not included in the definition of cruel treatment in the ICC

[429] See European Court of Human Rights, *Öcalan* v. *Turkey*, Judgment, 2005, paras 168–175, and UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: Guatemala*, UN Doc. CAT/C/GTM/CO/4, 25 July 2006, para. 22.

[430] See UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: Peru*, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

[431] See UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 33.

[432] See *ibid.* para. 35.

[433] See e.g. ICTY, *Naletilić and Martinović* Trial Judgment, 2003, para. 369; Inter-American Court of Human Rights, *Loayza Tamayo* v. *Peru*, Judgment, 1997, para. 57; European Court of Human Rights, *Ireland* v. *UK*, Judgment, 1978, para. 167; and UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 13.

[434] See ICTY, *Blaškić* Trial Judgment, 2000, para. 716, confirmed in *Orić* Trial Judgment, 2006, para. 352.

[435] See ICTY, *Limaj* Trial Judgment, 2005, para. 655.

[436] See *ibid.* paras 313 and 657.

[437] See ICTY, *Naletilić and Martinović* Trial Judgment, 2003, para. 394.

[438] See Inter-American Court of Human Rights, *Villagrán Morales and others* v. *Guatemala*, Judgment, 1999, para. 165; *'Juvenile Reeducation Institute'* v. *Paraguay*, Judgment, 2004, para. 167; and Inter-American Commission on Human Rights, *Case 11.710 (Colombia)*, Report, 2001, para. 34. For a finding that a threat of torture does not necessarily constitute cruel treatment, see European Court of Human Rights, *Hüsniye Tekin* v. *Turkey*, Judgment, 2005, para. 48.

[439] See Inter-American Court of Human Rights, *Caesar* v. *Trinidad and Tobago*, Judgment, 2005, para. 78.

[440] See Inter-American Commission on Human Rights, *Case 11.565 (Mexico)*, Report, 2000, para. 53.

[441] See Inter-American Commission on Human Rights, *Case 11.520 (Mexico)*, Report, 1998, para. 76.

Elements of Crimes.[442] This element, established in ICTY decisions and maintained consistently, was left out by the Preparatory Commission that developed the Elements of Crimes because it considered that attacks on human dignity would be covered by the war crime of 'outrages upon personal dignity'.[443]

e. Torture

i. Introduction

660 Torture is the last specific example of prohibited violence to life and person provided in common Article 3. This prohibition is a long-standing rule of humanitarian law.[444] It is included also in other provisions of the four Geneva Conventions and reaffirmed in the 1977 Additional Protocols.[445] The prohibition is now considered part of customary international law.[446] International and regional human rights treaties, within their respective fields of application, list the prohibition of torture as non-derogable.[447] There is no indication in law or derived from practice that the term 'torture' has a different meaning in international and non-international armed conflict.[448] For more details on torture as a grave breach in international armed conflict, see the commentary on Article 130, section D.2.

661 The French version of common Article 3 prohibits 'tortures et supplices', while the English text prohibits 'torture'. The use of the word 'supplices' in French does not, however, create any additional types of prohibited treatment that would not be covered by the term 'torture'.[449]

ii. Definition of torture

662 The Geneva Conventions and Additional Protocols do not define torture. The first definition in international treaty law is contained in Article 1(1) of the 1984 Convention against Torture. This definition includes the requirement that torture be committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

[442] See ICC Elements of Crimes (2002), Article 8(2)(c)(i)-3.
[443] See Dörmann, 2003, pp. 63–64.
[444] See e.g. Lieber Code (1863), Article 16.
[445] In addition to common Article 3, the prohibition of torture is included in Article 12 of the First and Second Conventions; Articles 17 and 87 of the Third Convention; Article 32 of the Fourth Convention; Article 75(2)(a)(ii) of Additional Protocol I; and Article 4(2)(a) of Additional Protocol II.
[446] See ICRC Study on Customary International Humanitarian Law (2005), Rule 90.
[447] See International Covenant on Civil and Political Rights (1966), Article 7; European Convention on Human Rights (1950), Article 3; American Convention on Human Rights (1969), Article 5(2); and the African Charter on Human and Peoples' Rights (1981), Article 5. See also the specific anti-torture conventions: the Convention against Torture (1984) and the Inter-American Convention against Torture (1985).
[448] See Dörmann, 2003, p. 401.
[449] *Le Grand Robert & Collins français-anglais*, 2008, translates 'supplice' as 'form of torture, torture'.

However, humanitarian law does not require an official involvement in the act of torture (see para. 681 of this commentary).

663 Thus, the ICTY defines torture for the purposes of humanitarian law as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for such purposes as to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[450]

664 Accordingly, the difference between torture and cruel treatment is that for torture there is a higher threshold of pain or suffering, which must be 'severe' rather than 'serious', and the infliction of pain or suffering must be the result of a specific purpose or motivation.

– Severe pain or suffering

665 The threshold of pain or suffering required by the ICTY for torture is higher than that for cruel treatment: 'severe' rather than 'serious'. The ICC Elements of Crimes, on the other hand, requires 'severe' physical or mental pain or suffering for both torture and cruel treatment.[451] They only differentiate between the two based on the purpose of the treatment. This was the result of a compromise and departed from the case law of the ICTY.[452]

666 Some authors have challenged the need to establish a hierarchy of suffering for cruel treatment and torture.[453] For them, the only element distinguishing torture from cruel treatment should be the specific purpose required for torture. An argument in favour of this doctrine is that it is difficult to define the threshold of intensity between serious suffering and severe suffering. It is also somewhat absurd to think of treatment more severe than 'cruel'.[454]

667 The wording of the different treaties leaves the question open.[455] Article 16 of the Convention against Torture speaks of 'acts of cruel, inhuman or degrading treatment or punishment which do not *amount* to torture' (emphasis added), which could imply a higher intensity of suffering for torture than for

[450] The ICTY initially listed the purposes in a closed list: See *Kunarac* Trial Judgment, 2001, para. 497. At the time, the Trial Chamber was satisfied that these purposes had become part of customary international law and it did not need to look into other possible purposes for the particular case on trial; see *ibid.* para. 485. The ICTY subsequently recognized that the list of purposes was not exclusive: see e.g. *Brđanin* Trial Judgment, 2004, para. 487; *Limaj* Trial Judgment, 2005, para. 235; and *Mrkšić* Trial Judgment, 2007, para. 513.

[451] See ICC Elements of Crimes (2002), Article 8(2)(c)(i)-3 (War crime of cruel treatment) and (c)(i)-4 (War crime of torture).

[452] See Dörmann, 2003, p. 63.

[453] See Evans; Rodley, 2002; and Nowak, 2005, p. 678, and 2006, p. 822. See also Nowak/McArthur, pp. 74 and 558, referring to the European Commission of Human Rights, *Greek case*, Report, 1969, p. 186 ('the word "torture" is often used to describe inhuman treatment, which has a purpose … and it is generally an aggravated form of inhuman treatment'), as confirmed by ICTY, *Delalić* Trial Judgment, 1998, para. 442. See also Rodley/Pollard, pp. 123–124.

[454] See Evans, pp. 33–49, especially at 49.

[455] See, in particular, International Covenant on Civil and Political Rights (1966), Article 7; European Convention on Human Rights (1950), Article 3; American Convention on Human Rights (1969), Article 5(2); and African Charter on Human and Peoples' Rights (1981), Article 5.

cruel, inhuman or degrading treatment. However, it could also mean that the specific purpose required for torture constitutes the aggravating element, and it seems that the question was left open during the drafting of that Convention.[456]

668 Even after the adoption of the ICC Elements of Crimes, the ICTY has continued to apply a differentiated threshold of pain or suffering to distinguish between torture and cruel treatment.[457] The European Court of Human Rights also requires a higher threshold of pain, in which the purpose of its infliction is a relevant factor,[458] and sometimes a determining one.[459] The Inter-American Commission and Court, like the ICTY, require a higher intensity of pain for torture than for cruel, inhuman or degrading treatment, as well as a purpose.[460] The ICRC also works on the basis of a different threshold of pain.[461] The UN Human Rights Committee, on the other hand, does not attempt to distinguish between the two.[462]

669 The main consequence of using the sole criterion of purpose to distinguish between torture and cruel treatment is that, in situations in which cruel treatment is inflicted for a specific purpose, it automatically amounts to torture. Considering the very wide definition of 'purpose', which includes such broad intentions as to intimidate or to coerce,[463] this would leave only an extremely narrow margin for cruel treatment between torture and outrages upon personal dignity. As pointed out above, case law has hitherto not discarded the intensity of suffering as an element distinguishing torture from cruel treatment, but it is not excluded that this may change in the future, especially if the ICC follows the clear wording of the Elements of Crimes. But if it does so,

[456] Burgers/Danelius, p. 150, refer only to the purpose as a distinctive feature; see also the account in Rodley, 2002.

[457] See ICTY, *Delalić* Trial Judgment, 1998, para. 468; *Kvočka* Trial Judgment, 2001, para. 142; *Krnojelac* Trial Judgment, 2002, paras 180–181; *Brđanin* Trial Judgment, 2004, para. 483; *Martić* Trial Judgment, 2007, paras 75 and 80; *Haradinaj* Trial Judgment, 2008, paras 126–127; *Haradinaj* Retrial Judgment, 2012, para. 422; and *Limaj* Trial Judgment, 2005, paras 231 and 235. For an example of cruel treatment not deemed severe enough to amount to torture, see ICTY, *Naletilić and Martinović* Trial Judgment, 2003, para. 369.

[458] See European Court of Human Rights, *Ireland* v. *UK*, Judgment, 1978, para. 167; *Aksoy* v. *Turkey*, Judgment, 1996, para. 64; *Selmouni* v. *France*, Judgment, 1999, paras 96–105; *Salman* v. *Turkey*, Merits, Judgment, 2000, para. 114; *Corsacov* v. *Moldova*, Judgment, 2006, para. 63; and *Menesheva* v. *Russia*, Judgment, 2006, para. 60.

[459] See European Court of Human Rights, *Kismir* v. *Turkey*, Judgment, 2005, paras 129–132.

[460] See Inter-American Court of Human Rights, *Caesar* v. *Trinidad and Tobago*, Judgment, 2005, paras 50, 68 and 87.

[461] See the ICRC policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty of 9 June 2011, reproduced in *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 547–562, fn. 1.

[462] The UN Human Rights Committee refers to the 'nature, purpose and severity' of the treatment (*General Comment No. 20, Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para. 4). Rodley, 2002, points out that it is impossible to infer any general criteria from the Committee's early case law.

[463] See ICTY, *Kvočka* Appeal Judgment, 2005, para. 140, and ICTR, *Akayesu* Trial Judgment, 1998, para. 682.

this should not be at the cost of raising the threshold of severity required for treatment to be deemed cruel.

670 To assess the severity of pain or suffering, the individual circumstances of each case have to be considered, both the objective elements related to the severity of the harm and the subjective elements related to the condition of the victim.[464] This assessment must therefore consider a number of factual elements, such as the environment, duration, isolation, physical or mental condition of the victim, cultural beliefs and sensitivity, gender, age, social, cultural, religious or political background, or past experiences.[465]

671 Specific factors include 'the nature and context of the infliction of pain',[466] 'the premeditation and institutionalisation of the ill-treatment', 'the physical condition of the victim', 'the manner and method used' and 'the position of inferiority of the victim'.[467] As with all forms of ill-treatment, 'in certain circumstances the suffering can be exacerbated by social and cultural conditions and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct'.[468]

672 Like cruel treatment, torture frequently does not take the form of an isolated act. It can be committed in one single act but can also result from a combination or accumulation of several acts which, taken individually, may not amount to torture. The duration, repetition and variety of forms of mistreatment should therefore be assessed as a whole.[469] However, 'no rigid durational requirement is built into the definition' of torture.[470] It does not need to cause a permanent injury.[471] As a result, 'evidence of the suffering need not even be visible after the commission of the crime'.[472]

[464] See ICTY, *Kvočka* Trial Judgment, 2001, para. 143, and *Brđanin* Trial Judgment, 2004, para. 483.
[465] See ICTY, *Mrkšić* Trial Judgment, 2007, para. 514; *Krnojelac* Trial Judgment, 2002, para. 182; *Limaj* Trial Judgment, 2005, para. 237; *Haradinaj* Retrial Judgment, 2012, para. 417; *Naletilić and Martinović* Appeal Judgment, 2006, para. 300; *Brđanin* Trial Judgment, 2004, paras 483–484; *Kvočka* Trial Judgment, 2001, para. 143; and *Martić* Trial Judgment, 2007, para. 75.
[466] ICTY, *Krnojelac* Trial Judgment, 2002, para. 182, confirmed by ICTY, *Mrkšić* Trial Judgment, 2007, para. 514. See also *Limaj* Trial Judgment, 2005, para. 237; *Haradinaj* Retrial Judgment, 2012, para. 417; and *Martić* Trial Judgment, 2007, para. 75 (only mentioning 'nature').
[467] ICTY, *Krnojelac* Trial Judgment, 2002, para. 182. See also *Mrkšić* Trial Judgment, 2007, para. 514; *Limaj* Trial Judgment, 2005, para. 237; *Haradinaj* Retrial Judgment, 2012 para. 417; *Naletilić and Martinović* Appeal Judgment, 2006, para. 300; *Brđanin* Trial Judgment, 2004, para. 484; and *Martić* Trial Judgment, 2007, para. 75.
[468] ICTY, *Limaj* Trial Judgment, 2005, para. 237.
[469] See ICTY, *Krnojelac* Trial Judgment, 2002, para. 182, and *Limaj* Trial Judgment, 2005, para. 237.
[470] ICTY, *Naletilić and Martinović* Appeal Judgment, 2006, para. 300.
[471] See ICTY, *Kvočka* Trial Judgment, 2001, paras 148–149; *Brđanin* Trial Judgment, 2004, para. 484; *Limaj* Trial Judgment, 2005, para. 236; *Mrkšić* Trial Judgment, 2007, para. 514; and *Haradinaj* Retrial Judgment, 2012, para. 417. See also *Brđanin* Appeal Judgment, 2007, para. 249 ('physical torture can include acts inflicting physical pain or suffering less severe than "extreme pain or suffering" or "pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"').
[472] ICTY, *Brđanin* Trial Judgment, 2004, para. 484; see also *Kunarac* Appeal Judgment, 2002, para. 150, and *Stanišić and Župljanin* Trial Judgment, 2013, para. 48.

673 Some acts meet the threshold of severity *per se*, as they necessarily imply severe pain or suffering.[473] This is the case, in particular, for rape.[474] In this respect, the ICTY has stated:

> Some acts, like rape, appear by definition to meet the severity threshold. Like torture, rape is a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person. Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.[475]

674 Other examples of torture gleaned from international decisions include electric shocks,[476] burning,[477] knee spread,[478] kneeling on sharp instruments,[479] suffocation by or under water,[480] burying alive,[481] suspension,[482] flogging and severe beatings,[483] especially beatings on the soles of the feet,[484] mock executions,[485]

[473] See ICTY, *Naletilić and Martinović* Appeal Judgment, 2006, para. 299, and *Brđanin* Appeal Judgment, 2007, para. 251.
[474] See ICTY, *Delalić* Trial Judgment, 1998, paras 495–497; *Kunarac* Appeal Judgment, 2002, para. 151; ICTR, *Akayesu* Trial Judgment, 1998, para. 682; European Court of Human Rights, *Aydin* v. *Turkey*, Judgment, 1997, paras 82–86; UN Committee against Torture, *T.A.* v. *Sweden*, Decisions, 2005, paras 2.4 and 7.3; and Inter-American Commission on Human Rights, *Case 10.970 (Peru)*, Report, 1996, p. 185. See also UN Commission on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment, Report by the UN Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.
[475] ICTY, *Brđanin* Trial Judgment, 2004, para. 485. See also *Stanišić and Župljanin* Trial Judgment, 2013, para. 48.
[476] See International Military Tribunal for the Far East, *Case of the Major War Criminals*, Judgment, 1948, in Röling/Rüter, pp. 406–407; UN Human Rights Committee, *Rodríguez* v. *Uruguay*, Views, 1994, paras 2.1 and 12.1; *Tshitenge Muteba* v. *Zaire*, Views, 1984, paras 8.2 and 12; European Court of Human Rights, *Çakici* v. *Turkey*, Judgment, 1999, para. 93; and UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: Switzerland*, UN Doc. CAT/C/CR/34/CHE, 21 June 2005, para. 4(b)(i).
[477] See International Military Tribunal for the Far East, *Case of the Major War Criminals*, Judgment, 1948, in Röling/Rüter, p. 407.
[478] See *ibid.*
[479] See *ibid.*
[480] See *ibid.* p. 406 (the so-called 'water treatment'); see also UN Human Rights Committee, *Rodríguez* v. *Uruguay*, Views, 1994, paras 2.1 and 12.1.
[481] See UN Human Rights Committee, *Eduardo Bleier* v. *Uruguay*, Views, 1980, paras 2.3 and 12.
[482] See International Military Tribunal for the Far East, *Case of the Major War Criminals*, Judgment, 1948, in Röling/Rüter, pp. 406–407 (sometimes combined with flogging); European Court of Human Rights, *Aksoy* v. *Turkey*, Judgment, 1996, para. 64; and UN Human Rights Committee, *Torres Ramírez* v. *Uruguay*, Views, 1980, para. 2.
[483] See International Military Tribunal for the Far East, *Case of the Major War Criminals*, Judgment, 1948, in Röling/Rüter, p. 408, and European Court of Human Rights, *Selmouni* v. *France*, Judgment, 1999, para. 101.
[484] See European Court of Human Rights, *Aksoy* v. *Turkey*, Judgment, 1996, para. 64.
[485] See International Military Tribunal for the Far East, *Case of the Major War Criminals*, Judgment, 1948, in Röling/Rüter, p. 408; European Commission of Human Rights, *Greek case*, Report, 1969, pp. 462–465; and UN Human Rights Committee, *Tshitenge Muteba* v. *Zaire*, Views, 1984, pp. 182–188, paras 8.2 and 12.

mock burials,[486] threats to shoot or kill,[487] exposure of detainees under interrogation to severe cold for extended periods,[488] beating followed by detention for three days where food and water and the possibility to use a lavatory are denied,[489] a combination of restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, threats, including death threats, violent shaking and using cold air to chill.[490]

675 Mental pain and suffering on its own can be severe enough to amount to torture.[491] The Third Geneva Convention and Additional Protocol I explicitly spell out that both physical and mental torture are prohibited.[492] Psychological methods of torture as well as the psychological effects of torture can cause suffering as severe as physical torture and its physical effects.[493] The ICTY has considered that being forced to watch severe mistreatment inflicted on a relative,[494] or being forced to watch serious sexual attacks inflicted on an acquaintance, was torture for the coerced observer.[495] It has held likewise with regard to threats of death causing severe mental suffering, and falsely informing the victim that his father had been killed,[496] or obliging victims to collect the dead bodies of other members of their ethnic group, in particular those of their neighbours and friends.[497]

– Specific purpose

676 A constitutive element of torture is that it is committed for a specific purpose or motive. The Convention against Torture gives the following examples: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, and (c) discriminating, on any ground, against the

[486] See Inter-American Commission on Human Rights, *Case 7823 (Bolivia)*, Resolution, 1982, p. 42.
[487] See European Commission of Human Rights, *Greek case*, Report, 1969, pp. 462–465.
[488] See UN Committee against Torture, *Report on Mexico produced by the Committee under Article 20 of the Convention, and reply of the Government of Mexico*, UN Doc. CAT/C/75, 26 May 2003, para. 165.
[489] See UN Committee against Torture, *Danilo Dimitrijević* v. *Serbia and Montenegro*, Decisions, 2005, paras 2.1, 2.2, 7.1 and 7.2.
[490] See UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: Israel*, UN Doc. A/52/44, 10 September 1997, paras 253–260.
[491] See ICTY, *Kvočka* Trial Judgment, 2001, para. 149; see also *Limaj* Trial Judgment, 2005, para. 236; *Haradinaj* Retrial Judgment, 2012, para. 417; and *Mrkšić* Trial Judgment, 2007, para. 514.
[492] See Third Convention, Article 17(4), see also Article 99(2) ('moral or physical coercion'), and Additional Protocol I, Article 75(2)(a)(ii).
[493] See Inter-American Court of Human Rights, *Maritza Urrutia v. Guatemala*, Judgment, 2003, para. 93. For more details on this subject, see Reyes.
[494] See ICTY, *Kvočka* Trial Judgment, 2001, para. 149.
[495] See ICTY, *Furundžija* Trial Judgment, 1998, para. 267.
[496] See ICTY, *Naletilić and Martinović* Trial Judgment, 2003, paras 446–447.
[497] See ICTY, *Brđanin* Trial Judgment, 2004, para. 511.

victim or a third person.[498] The ICTY considers these purposes to be part of customary international law.[499]

677 These purposes are illustrative in nature, and do not constitute an exhaustive list. This is confirmed by the wording of Article 1 of the Convention against Torture, which speaks of 'such purposes as'.[500] The non-exhaustive list set out in the Convention against Torture is also reflected in the ICC Elements of Crimes.[501] The ICTY also considers the list non-exhaustive.[502]

678 In practice, this leads to an extremely wide meaning of improper purpose. Indeed, 'intimidating or coercing [the victim] or a third person' and 'reason based on discrimination of any kind' are such broad notions that most deliberate acts causing severe suffering to a specific person, especially in detention, will be caused for one of these purposes or a purpose very similar to this one. The purpose cannot, however, be of any sort, but must have 'something in common with the purposes expressly listed'.[503] Hence, the ICTY considered that 'humiliation', which it considered to be close to the notion of intimidation, was also one of the possible purposes of torture.[504]

679 As a result, the ICTY affirmed that these purposes would be present in the case of rape during interrogation of a detainee: 'Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person.'[505]

680 The ICTY has also determined that a prohibited purpose 'need be neither the sole nor the main purpose of inflicting the severe pain or suffering' for it to support a finding of torture.[506]

[498] See Convention against Torture (1984), Article 1.
[499] See ICTY, *Kunarac* Trial Judgment, 2001, para. 485. In this case, the Tribunal did not have to address whether other purposes were included under customary international law. See also *Krnojelac* Trial Judgment, 2002, para. 185.
[500] See also ICTY, *Delalić* Trial Judgment, 1998, para. 470, and ICTR, *Musema* Trial Judgment, 2000, para. 285.
[501] See ICC Elements of Crimes (2002), Article 8(2)(a)(ii) and (c)(i): 'The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.'
[502] See e.g. ICTY, *Brđanin* Trial Judgment, 2004, para. 487; *Limaj* Trial Judgment, 2005, para. 235; and *Mrkšić* Trial Judgment, 2007, para. 513.
[503] Burger/Danelius, p. 118.
[504] See ICTY, *Furundžija* Trial Judgment, 1998, para. 162. See also *Naletilić and Martinović* Trial Judgment, 2003, para. 337.
[505] ICTY, *Furundžija* Trial Judgment, 1998, para. 163.
[506] ICTY, *Kvočka* Trial Judgment, 2001, para. 153. See also *Delalić* Trial Judgment, 1998, para. 470; *Krnojelac* Trial Judgment, 2002, para. 184; *Kunarac* Trial Judgment, 2001, para. 486, and Appeal Judgment, 2002, para. 155; *Haradinaj* Trial Judgment, 2008, para. 128, and Retrial Judgment, 2012, para. 418; *Limaj* Trial Judgment, 2005, para. 239; *Martić* Trial Judgment, 2007, para. 77; *Mrkšić* Trial Judgment, 2007, para. 515; *Brđanin* Trial Judgment, 2004, para. 487; and *Kunarac* Trial Judgment, 2001, para. 486, and Appeal Judgment, 2002, para. 155.

– Official involvement

681 The definition of torture under humanitarian law does not require an official involvement in the act. The 1984 Convention against Torture, on the other hand, provides that the pain or suffering must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[507] In its early decisions, the ICTY determined that this definition was part of customary international law applicable in armed conflict.[508] Subsequently, however, the Tribunal concluded that the definition of torture under humanitarian law did not comprise the same elements. In particular, 'the presence of a state official or of any other authority-wielding person in the torture process' was not considered necessary for the offence to be regarded as torture under humanitarian law.[509] This reasoning corresponds to the scope of application of common Article 3, which prohibits torture not only when committed by State armed forces, but also when committed by non-State armed groups.

3. *Taking of hostages*

a. *Introduction*

682 Up through the Second World War, the taking of hostages was still considered lawful, albeit under very strict conditions.[510] However, in response to hostage-related abuses during the Second World War, the 1949 Geneva Conventions completely outlawed this practice.[511] The two Additional Protocols reaffirmed this categorical prohibition.[512] The prohibition is now part of customary international law.[513]

b. *Definition of hostage-taking*

683 The Geneva Conventions and Additional Protocols do not define hostage-taking. In a different legal context, the 1979 International Convention against the Taking of Hostages defines hostage-taking as the seizure or detention of a

[507] Convention against Torture (1984), Article 1.
[508] See ICTY, *Delalić* Trial Judgment, 1998, para. 459, and *Furundžija* Trial Judgment, 1998, para. 162, and Appeal Judgment, 2000, para. 111.
[509] ICTY, *Kunarac* Trial Judgment, 2001, para. 496, confirmed in Appeal Judgment, 2002, para. 148. See also *Simić* Trial Judgment, 2003, para. 82; *Brđanin* Trial Judgment, 2004, para. 488; *Kvočka* Appeal Judgment, 2005, para. 284; *Limaj* Trial Judgment, 2005, para. 240; *Mrkšić* Trial Judgment, 2007, para. 514; *Haradinaj* Retrial Judgment, 2012, para. 419; and *Stanišić and Župljanin* Trial Judgment, 2013, para. 49.
[510] See United States, Military Court at Nuremberg, *Hostages case*, Judgment, 1948, pp. 1249–1251.
[511] For more details on the history of the prohibition of hostage-taking, see the commentary on Article 34 of the Fourth Convention.
[512] Additional Protocol I, Article 75(2)(c); Additional Protocol II, Article 4(2)(c).
[513] ICRC Study on Customary International Humanitarian Law (2005), Rule 96.

person (the hostage), accompanied by the threat to kill, to injure or to continue to detain that person in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for their release.[514]

684 This definition provided the basis for the elements of the war crime of hostage-taking in the 1998 ICC Statute, but with the addition of the catch-all formulation that the person was seized, detained 'or otherwise held hostage'.[515] On this basis, the SCSL Appeals Chamber concluded that 'the precise means by which the individual falls into the hands of the perpetrator is not the defining characteristic of the offence'.[516]

685 The broad definition set forth in the ICC Elements of Crimes is also valid for the underlying prohibition of hostage-taking contained both in common Article 3 and in Article 34 of the Fourth Convention. Indeed, the group of experts who drafted the Elements of Crimes was of the view that there can be no difference between hostage-taking in international armed conflict and hostage-taking in non-international armed conflict.[517]

686 Accordingly, for the purpose of common Article 3, hostage-taking can be defined as the seizure, detention or otherwise holding of a person (the hostage) accompanied by the threat to kill, injure or continue to detain that person in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release, safety or well-being of the hostage.

687 Today, hostages are often taken to exact a ransom, to obtain prisoner exchanges or to recover 'war taxes'.[518] Such practices are sometimes referred to as kidnapping or abduction, but the different labels do not affect the legal qualification.[519] Provided all the requisite conditions are met, these practices constitute hostage-taking and are prohibited under common Article 3.

[514] International Convention against the Taking of Hostages (1979), Article 1.

[515] Article 8(2)(a)(viii) of the 2002 ICC Elements of Crimes, concerning the war crime of taking hostages, reads in part:

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949 [i.e. they were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities].

For a commentary on these elements, see Dörmann, 2003, pp. 406–407; see also pp. 124–127.

[516] SCSL, *Sesay* Appeal Judgment, 2009, para. 598.

[517] Dörmann, 2003, p. 406.

[518] For examples of current practice, see Herrmann/Palmieri, pp. 142–145, and Sivakumaran, 2012, pp. 269–271.

[519] For a definition of 'kidnapping', see UN Economic and Social Council, Res. 2002/16, International cooperation in the prevention, combating and elimination of kidnapping and in providing assistance for the victims, 24 July 2002, para. 1 ('unlawfully detaining a person or persons against their will for the purpose of demanding for their liberation an illicit gain or any other economic gain or other material benefit, or in order to oblige someone to do or not to do something'). Abduction is not defined in international law. In its ordinary meaning it refers to

i. The hostage

688 The prohibition of hostage-taking in common Article 3 applies to all persons falling within the protective scope of the article.[520] In *Sesay*, the SCSL Trial Chamber held that 'the person or persons held hostage must not be taking a direct part in the hostilities at the time of the alleged violation'.[521] In the Trial Chamber's opinion, 'the term "hostage" must be interpreted in its broadest sense'.[522] In this instance, the accused were charged with the abduction of several hundred members of the UN Mission in Sierra Leone peacekeeping forces and with using them as hostages.[523]

689 Hostages are often persons – such as civilians posing no security threat – who are captured and detained unlawfully. However, unlawful detention is not a precondition for hostage-taking. Persons whose detention may be lawful, such as in the case of civilians posing a security threat, could nevertheless be used as hostages, which would then qualify the situation as hostage-taking. The requisite intent to take hostages need not be present at the outset of a detention; it can develop during the detention.[524] This was confirmed by the SCSL Appeals Chamber in 2009:

> As a matter of law, the requisite intent [for hostage-taking] may be present at the moment the individual is first detained or may be formed at some time thereafter while the persons were held. In the former instance, the offence is complete at the time of the initial detention (assuming all the other elements of the crime are satisfied); in the latter, the situation is transformed into the offence of hostage-taking the moment the intent crystallises (again, assuming the other elements of the crime are satisfied).[525]

690 This is significant because earlier ICTY decisions seemed to indicate that unlawful deprivation of liberty was part of the definition of hostage-taking.[526]

taking someone away illegally by force or deception; see *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 2.

[520] For more details, see section E. Under humanitarian law applicable to international armed conflicts, prisoners of war also benefit from the prohibition against hostage-taking. See also Additional Protocol I, Article 75(2)(c); ICC Statute (1998), Article 8(2)(a)(viii); and Henckaerts/Doswald-Beck, Rule 96 and its commentary, pp. 334–336.

[521] SCSL, *Sesay* Trial Judgment, 2009, para. 241.

[522] *Ibid.* with reference to Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, Article 34, p. 230, cited with approval by ICTY, *Blaškić* Trial Judgment, 2000, para. 187.

[523] SCSL, *Sesay* Corrected Amended Consolidated Indictment, 2006, Count 18.

[524] See also Sivakumaran, 2010a, p. 1033, and 2012, p. 269.

[525] SCSL, *Sesay* Appeal Judgment, 2009, para. 597.

[526] See ICTY, *Blaškić* Trial Judgment, 2000, para. 158 ('civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However, as asserted by the Defence, detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel.') and para. 187 ('The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the [1993 ICTY] Statute, that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death.'); and *Kordić and Čerkez* Trial Judgment, 2001, para. 314 ('an individual commits the offence of taking civilians as

However, these decisions can also be interpreted for the proposition that the deprivation of liberty was unlawful *because* it was hostage-taking. Perhaps more importantly, the ICTY did not examine the same question as the SCSL, i.e. whether an initial detention not carried out for the purpose of hostage-taking can become hostage-taking if the unlawful purpose arises at some time thereafter.

ii. Threats made to the hostage

691 As defined above, hostage-taking involves threats to kill, injure or continue to detain the hostage. Threats to injure hostages cover threats to both their physical and their mental well-being. This interpretation follows from the prohibition of violence to both the physical and the mental well-being of detainees.[527] Thus, the ICTY held that '[t]he additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental well-being of civilians'.[528]

692 The threat made must itself be unlawful under humanitarian law. A threat to continue the detention of a person, therefore, would not always amount to hostage-taking. For example, as part of the negotiation of a prisoner exchange, it would not violate the prohibition of hostage-taking to threaten to continue to detain someone whose release is not legally required.[529] It would, however, be unlawful to make such a threat if the detention would be arbitrary.[530] The mere fact of detention of a combatant by a non-State armed group cannot be seen as hostage-taking under common Article 3.

iii. Intent to compel a third party

693 Hostage-taking is done 'in order to compel' a third party. Hence, a conditional threat must be issued that is 'intended as a coercive measure to achieve the fulfilment of a condition'.[531] As indicated in the definition of hostage-taking, the threat may be explicit or implicit.[532]

hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition').

[527] See section G.2.a and Additional Protocol II, Article 4(2)(a). It is furthermore consistent with the fact that threats of such behaviour are also unlawful; see Additional Protocol II, Article 4(2)(h).

[528] ICTY, *Kordić and Čerkez* Trial Judgment, 2001, para. 313.

[529] In the context of an international armed conflict, the detention of prisoners of war by a Party to the conflict in accordance with the Third Convention does not constitute hostage-taking. However, a threat to kill or injure a prisoner of war, or to detain them beyond the period allowed by the Third Convention, in order to compel a third party to act in a certain way may, depending on the circumstances, constitute hostage-taking.

[530] On the customary prohibition of arbitrary detention, see Henckaerts/Doswald-Beck, Rule 99 and its commentary, pp. 344–352.

[531] ICTY, *Kordić and Čerkez* Trial Judgment, 2001, para. 313; SCSL, *Sesay* Trial Judgment, 2009, para. 243, and Appeal Judgment, 2009, para. 583.

[532] See SCSL, *Sesay* Trial Judgment, 2009, para. 1964.

694 In *Sesay*, the SCSL Trial Chamber held that the 'offence of hostage taking requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives'.[533] In this case, the Trial Chamber found that the accused had repeatedly threatened captured peacekeepers,[534] but it found no evidence that the threat had been communicated to a third party, nor evidence of an implicit threat that the peacekeepers would be harmed or the communication of an implicit condition for the safety or release of the peacekeepers.[535] However, the SCSL Appeals Chamber considered that '[i]t does not follow from a requirement that the threat be made with an intention to coerce that the threat be communicated to the third party' and concluded that '[i]t suffices that the threat be communicated to the detained individual'.[536]

iv. Purpose of hostage-taking

695 As reflected in the definition, hostage-taking is carried out in order to compel a third party to do or to abstain from doing 'any act', which is a very broad notion. The ICTY stated that hostage-taking is carried out 'to obtain a concession or gain an advantage', which is equally broad.[537]

696 In *Sesay*, for example, the accused, members of the Revolutionary United Front (RUF), had detained peacekeeping forces who, after the capture of the RUF leader, were used as hostages in order to compel his release.[538]

697 Other purposes of hostage-taking may include rendering areas or military objectives immune from military operations by using captives as human shields.[539] In such instances, hostage-taking may also violate the prohibition of cruel treatment or the prohibition of collective punishments.[540] However, the analysis of each specific violation has to be carried out separately.

698 Hostage-taking is prohibited irrespective of the conduct that the hostage-taker seeks to impose. Thus, hostage-taking is not lawful even when it is aimed

[533] *Ibid.*
[534] *Ibid.* para. 1963.
[535] *Ibid.* paras 1965–1968.
[536] SCSL, *Sesay* Appeal Judgment, 2009, paras 582–583.
[537] ICTY, *Blaškić* Trial Judgment, 2000, para. 158; see also para. 187 ('to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking'); *Blaškić* Appeal Judgment, 2004, para. 639 ('the use of a threat concerning detainees so as to obtain a concession or gain an advantage'); *Kordić and Čerkez* Trial Judgment, 2001, para. 319.
[538] SCSL, *Sesay* Appeal Judgment, 2009, paras 596–601.
[539] See also Gasser/Dörmann, para. 535(3).
[540] For the qualification of the use of 'human shields' as cruel treatment, see paras 656 and 658 of this commentary. For the prohibition of collective punishments, see Additional Protocol II, Article 4(2)(b); see also ICRC Study on Customary International Humanitarian Law (2005), Rule 103. In relation to international armed conflict, see Third Convention, Article 87(3), Fourth Convention, Article 33(1), and Additional Protocol I, Article 75(2)(d).

at compelling a third party to cease an unlawful conduct. Violations of common Article 3 are not a legitimate way to ensure respect for humanitarian law.[541]

4. *Outrages upon personal dignity, in particular humiliating and degrading treatment*

a. *Introduction*

699 The prohibition of outrages upon personal dignity first appeared in common Article 3. It was reaffirmed in the Additional Protocols and is today considered part of customary international law.[542] International and regional human rights treaties, within their respective fields of application, list the prohibition of 'inhuman and degrading treatment' as non-derogable.[543] As noted above, the term 'outrages upon personal dignity' can relate to cruel treatment and torture, but also has its own characteristics.

b. *Definition of outrages upon personal dignity*

700 The Geneva Conventions and Additional Protocols do not define the term 'outrages upon personal dignity'. The ICTY requires that 'the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity'.[544] It has held that this assessment should not be based only on subjective criteria related to the sensitivity of the victim, but also on objective criteria related to the gravity of the act.[545] Concerning the gravity of the act, the Tribunal held that the humiliation of the victim must be so intense that any reasonable person would be outraged.[546]

701 Like cruel treatment and torture, outrages upon personal dignity frequently do not take the form of an isolated act. The offence can be committed in one single act but can also result from a combination or accumulation of several

[541] On the concept of belligerent reprisals in non-international armed conflicts, see section M.6.
[542] Additional Protocol I, Article 75(2)(b); Additional Protocol II, Article 4(2)(e); ICRC Study on Customary International Humanitarian Law (2005), Rule 90.
[543] International Covenant on Civil and Political Rights (1966), Article 7; European Convention on Human Rights (1950), Article 3; American Convention on Human Rights (1969), Article 5(2); African Charter on Human and Peoples' Rights (1981), Article 5. See also Convention against Torture (1984); Inter-American Convention against Torture (1985); and European Convention for the Prevention of Torture (1987).
[544] ICTY, *Kunarac* Trial Judgment, 2001, para. 514, and Appeal Judgment, 2002, paras 161 and 163. See also *Haradinaj* Trial Judgment, 2008, para. 132 (using 'severe' instead of 'serious'); ICTR, *Bagosora* Trial Judgment, 2008, para. 2250; *Renzaho* Trial Judgment, 2009, para. 809; *Nyiramasuhuko* Trial Judgment, 2011, para. 6178; SCSL, *Taylor* Trial Judgment, 2012, para. 431; *Sesay* Trial Judgment, 2009, para. 175; and *Brima* Trial Judgment, 2007, para. 716.
[545] See ICTY, *Aleksovski* Trial Judgment, 1999, para. 56, and *Kunarac* Trial Judgment, 2001, para. 504, and Appeal Judgment, 2002, paras 162–163.
[546] *Ibid.*

acts which, taken individually, might not amount to an outrage upon person dignity. According to the ICTY:

> [T]he seriousness of an act and its consequences may arise either from the nature of the act *per se* or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the [1993 ICTY] Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.[547]

702 While the humiliation and degradation must be 'real and serious', it need not be lasting.[548] No prohibited purposes such as those which characterize the crime of torture is required.[549]

703 The ICC Elements of Crimes defines the material elements of outrages upon personal dignity as an act in which '[t]he perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons' and '[t]he severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity'.[550] While this definition is tautological, it gives the indication that the violation does not require severe mental or physical pain (as torture does), but that it has to be significant in order to be distinguished from a mere insult.[551] This also follows from the ordinary meaning of the term 'outrage'.[552]

704 According to the ICC Elements of Crimes, the prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, includes those committed against dead persons.[553] This clarification is important because recent armed conflicts show that it is not unusual, even today, for human remains to be treated in a degrading and humiliating manner. The ICTR and the ICTY, for example, have documented the mutilation of dead bodies.[554]

[547] ICTY, *Aleksovski* Trial Judgment, 1999, para. 57.
[548] See ICTY, *Kunarac* Trial Judgment, 2001, para. 501, and *Kvočka* Trial Judgment, 2001, para. 168. See also SCSL, *Sesay* Trial Judgment, 2009, para. 176.
[549] ICTY, *Kvočka* Trial Judgment, 2001, para. 226.
[550] ICC Elements of Crimes (2002), Article 8(2)(c)(ii).
[551] For a view that the prohibition under international humanitarian law is wider than the prohibition under international criminal law, see Sivakumaran, 2012, p. 264.
[552] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 1017 ('an extremely strong reaction of anger or indignation; violate or infringe (a law or principle) flagrantly').
[553] ICC Elements of Crimes (2002), Article 8(2)(c)(ii), fn. 57. See also UN Human Rights Council, Advisory Committee, Fourth Session, 25–29 January 2010, *Study on best practices on the issue of missing persons*, UN Doc. A/HRC/AC/4/CRP.2/Rev.1, 25 January 2010, paras 66–71, and ICTY, *Tadić* Trial Judgment, 1997, para. 748.
[554] See ICTR, *Niyitegeka* Trial Judgment, 2003, para. 303, and ICTY, *Delalić* Trial Judgment, 1998, para. 849. Other examples of outrages upon personal dignity include taking body parts as trophies and exposing a corpse to public display and denigration.

705 The ICC Elements of Crimes further specifies that the victim need not personally be aware of the humiliation.[555] The last point was made in order to cover the deliberate humiliation of unconscious persons or persons with mental disabilities. The Elements of Crimes also notes that relevant aspects of the cultural background of the person need to be taken into account, thereby covering treatment that is, for example, humiliating to someone of a particular nationality, culture or religion, while not necessarily to others.[556]

706 None of the international criminal tribunals have attempted to distinguish between 'humiliating' and 'degrading' treatment. While common Article 3 uses both terms in juxtaposition, suggesting that they could refer to different concepts, their ordinary meaning is nearly identical.[557] The question whether there could conceivably be any treatment amounting to outrages upon personal dignity that would be humiliating but not degrading (or vice versa) is ultimately irrelevant since both acts are prohibited by common Article 3. The same could be said of 'outrages upon personal dignity' in relation to the two other concepts. Despite the use of 'in particular' in the provision, it is hard to conceive of 'outrages' which would not be humiliating or degrading.

707 The question also arises of whether the physical or mental suffering must attain a higher threshold in order to constitute cruel treatment. The fact that the grave breaches provisions criminalize inhuman (or cruel) treatment but not outrages upon personal dignity might suggest so. That said, the ICTY's definitions of cruel or inhuman treatment and of outrages upon personal dignity overlap, since both definitions include the phrase 'serious attacks on human dignity'. Indeed, the two notions do necessarily overlap to a certain extent. Depending on the circumstances, treatment which is considered degrading or humiliating could turn into cruel treatment if repeated over a certain period of time or if committed against a person in a particularly vulnerable situation. Degrading or humiliating treatment could also qualify as torture if committed for a specific purpose and causing severe pain or suffering.

708 Specific acts that have been considered as degrading treatment by international criminal tribunals include: forced public nudity;[558] rape and sexual violence;[559] 'sexual slavery, including the abduction of women and girls as "bush wives", a conjugal form of sexual slavery';[560] the use of detainees as human shields or trench diggers;[561] inappropriate conditions of confinement; being forced to perform subservient acts; being forced to relieve bodily

[555] ICC Elements of Crimes (2002), Article 8(2)(c)(ii), fn. 57.
[556] *Ibid.*
[557] The *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 377, defines 'degrading' as 'causing a loss of self-respect; humiliating'.
[558] ICTY, *Kunarac* Trial Judgment, 2001, paras 766–774.
[559] ICTY, *Furundžija* Trial Judgment, 1998, paras 270–275; ICTR, *Ndindiliyimana* Trial Judgment, 2011, para. 2158.
[560] SCSL, *Taylor* Trial Judgment, 2012, para. 432.
[561] ICTY, *Aleksovski* Trial Judgment, 1999, para. 229.

functions in one's clothing; or enduring the constant fear of being subjected to physical, mental or sexual violence.[562] The Third Convention envisages that some forms of labour may be regarded as humiliating. The threshold is an objective one; where the labour would be looked upon as humiliating for a member of the Detaining Power's own forces, it must not be assigned to a prisoner of war.[563]

709 Examples of degrading treatment gleaned from decisions of human rights bodies include: treatment or punishment of an individual if it 'grossly humiliates him before others or drives him to act against his will or conscience';[564] not allowing a prisoner to change their soiled clothes;[565] and cutting off a person's hair or beard as punishment.[566]

5. *Requirement of a regularly constituted court affording all the indispensable judicial guarantees*

a. *Introduction*

710 Common Article 3 prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. This provision was fleshed out in Additional Protocol II and is part of customary international law.[567]

711 This provision prohibits 'summary' justice or trial by any tribunal that fails to qualify as fair and regular. It does not, however, provide immunity from trial for any offence; it does not prevent a person suspected of an offence from being arrested, prosecuted, sentenced and punished according to the law.

712 Common Article 3 refers to 'the passing of sentences and the carrying out of executions'. 'Sentence' is defined as '[t]he judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer'.[568] This means that the guarantee of a fair trial in common Article 3 applies to the prosecution and punishment of persons charged with a penal offence.

713 As regards the 'carrying out of executions', which is not prohibited by common Article 3, other treaties may have an impact for States Parties. First, Additional Protocol II limits the right to impose and carry out the death penalty on persons who were under the age of 18 years at the time they committed the

[562] ICTY, *Kvočka* Trial Judgment, 2001, para. 173.
[563] For more details, see the commentary on Article 52, section D.
[564] European Commission of Human Rights, *Greek case*, Report, 1969, p. 186.
[565] European Court of Human Rights, *Hurtado* v. *Switzerland*, Judgment, 1994, para. 12.
[566] European Court of Human Rights, *Yankov* v. *Bulgaria*, Judgment, 2003, paras 114 and 121.
[567] Additional Protocol II, Article 6(2); ICRC Study on Customary International Humanitarian Law (2005), Rule 100. See also Additional Protocol I, Article 75.
[568] Bryan A. Garner (ed.), *Black's Law Dictionary*, 11th edition, Thomson Reuters, 2019, p. 1636.

offence and on pregnant women and mothers of young children, respectively.[569] Humanitarian law does not prohibit the imposition of death sentences or the carrying out of a death sentence against other persons. However, it sets out strict rules in respect of international armed conflicts for the procedure under which a death sentence can be pronounced and carried out.[570] In addition, several treaties prohibit the death penalty altogether for States Parties.[571] Many countries have abolished the death penalty, even for military offences.[572]

b. Regularly constituted courts

714 The requirement that a court be regularly constituted was replaced in Article 6(2) of Additional Protocol II by the requirement that a court offer 'the essential guarantees of independence and impartiality'. This formula was taken from Article 84 of the Third Convention. It focuses more on the capacity of the court to conduct a fair trial than on how it is established. This takes into account the reality of non-international armed conflict (see also paras 728–729 of this commentary). The ICC Elements of Crimes also defines a 'regularly constituted' court as one that affords 'the essential guarantees of independence and impartiality'.[573] According to these texts, the requirements of independence and impartiality are the touchstones for interpreting the meaning of this term.

715 The 1966 International Covenant on Civil and Political Rights and other human rights treaties provide for the right to a fair trial. These treaties specify that for a trial to be fair it must be conducted by a court that is 'independent' and 'impartial'.[574] Human rights bodies have stated that the fundamental principles of fair trial and the

[569] Additional Protocol II, Article 6(4). For international armed conflict, see Article 68(4) of the Fourth Convention and Articles 76(3) and 77(5) of Additional Protocol I.

[570] See Third Convention, Articles 100–101 and 107, and Fourth Convention, Articles 68, 71 and 74–75.

[571] Second Optional Protocol to the International Covenant on Civil and Political Rights (1989); Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990); and Protocols 6 (1983) and 13 (2002) to the European Convention on Human Rights.

[572] Article 2(1) of the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights allows States to enter a reservation to the Protocol which 'provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime'. Eight reservations were entered to this article, of which three were withdrawn and five are still in force. The 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty allows for similar reservations. Two States entered reservations in this respect, both of which are still in force. For more information on the death penalty, see e.g. Hans Nelen and Jacques Claessen (eds), *Beyond the Death Penalty: Reflections on Punishment*, Intersentia, Cambridge, 2012; Austin Sarat and Jürgen Martschukat (eds), *Is the Death Penalty Dying? European and American Perspectives*, Cambridge University Press, 2011; William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd edition, Cambridge University Press, 2002, and 'The Right to Life', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, pp. 365–385; and Elizabeth Wicks, *The Right to Life and Conflicting Interests*, Oxford University Press, 2010.

[573] ICC Elements of Crimes (2002), Article 8(2)(c)(iv).

[574] International Covenant on Civil and Political Rights (1966), Article 14(1); Convention on the Rights of the Child (1989), Article 40(2)(b); European Convention on Human Rights (1950), Article 6(1); American Convention on Human Rights (1969), Article 8(1); and African Charter on Human and Peoples' Rights (1981), Articles 7 and 26.

requirement that courts be independent and impartial can never be dispensed with.[575] The interpretation given to these terms by these bodies is also relevant in the context of common Article 3, at least for courts operated by State authorities.

716 For a court to be independent, it must be able to perform its functions without interference from any other branch of government, especially the executive.[576] Therefore, the judges must have guarantees of security of tenure.[577] The requirement of independence does not necessarily preclude the court from being composed of persons from the executive branch of government, for example members of the armed forces, so long as procedures are in place to ensure they perform their judicial functions independently and impartially.

717 The requirement of impartiality has two aspects, one subjective and one objective. First, in order to be impartial, the judges composing the court must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the matter before them, nor act in ways that improperly promote the interests of one side.[578] Second, the court must be impartial from an objective viewpoint, i.e. it must appear to a reasonable observer to be impartial.[579] These two aspects of the requirement of impartiality have also been applied by the ICTY and the ICTR.[580]

[575] See UN Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras 11 and 16; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and others* v. *Nigeria*, Decision, 2001, para. 27; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras 245–247; and Inter-American Court of Human Rights, *Judicial Guarantees case*, Advisory Opinion, 1987, paras 29–30.

[576] See e.g. African Commission on Human and Peoples' Rights, *Centre for Free Speech* v. *Nigeria*, Decision, 1999, paras 15–16; European Court of Human Rights, *Belilos case*, Judgment, 1988, para. 64; *Findlay* v. *UK*, Judgment, 1997, paras 73–77; and UN Human Rights Committee, *Bahamonde* v. *Equatorial Guinea*, Views, 1993, para. 9.4.

[577] For more details, see UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19, and Basic Principles on the Independence of the Judiciary (1985). The Inter-American Commission on Human Rights underlined the need for freedom from interference from the executive and for judges' security of tenure; see Inter-American Commission on Human Rights, *Annual Report 1992–1993*, OAS Doc. OEA/Ser.L/V/II.83 doc. 14, 12 March 1993, p. 207, and *Case 11.006 (Peru)*, Report, 1995, section VI(2)(a). See also Canada, Supreme Court, *Ell case*, Judgment, 2003, paras 18–32, and United States, Supreme Court, *Hamdan case*, Judgment, 2006, p. 632.

[578] UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 21; *Karttunen* v. *Finland*, Views, 1992, para. 7.2; and European Court of Human Rights, *İncal* v. *Turkey*, Judgment, 1998, para. 65. See also Australia, Military Court at Rabaul, *Ohashi case*, Judgment, 1946.

[579] See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 21; see also African Commission on Human and Peoples' Rights, *Constitutional Rights Project* v. *Nigeria*, Decision, 1995, para. 8; *Malawi African Association and others* v. *Mauritania*, Decision, 2000, para. 98; European Court of Human Rights, *Piersack* v. *Belgium*, Judgment, 1982, paras 28–34; *De Cubber* v. *Belgium*, Judgment, 1984, paras 24–26; *Findlay* v. *UK*, Judgment, 1997, para. 73; and Inter-American Commission on Human Rights, *Case 10.970 (Peru)*, Report, 1996, section V(B)(3)(c).

[580] See e.g. ICTY, *Furundžija* Appeal Judgment, 2000, paras 189–191; *Mucić* Appeal Judgment, 2001, paras 682–684; and *Galić* Appeal Judgment, 2006, paras 37–41; ICTR, *Akayesu* Appeal

718 The requirements of independence of the judiciary, in particular from the executive, and of subjective and objective impartiality apply equally to civilian, military and special security courts. The trial of civilians by military or special security courts should be exceptional and take place under conditions which genuinely afford the full guarantees of fair trial as required by common Article 3.[581]

c. Judicial guarantees which are indispensable

719 There was some debate at the 1949 Diplomatic Conference as to whether to include a list of guarantees in common Article 3 or whether to make reference to the rest of the Conventions and the guarantees contained therein. A proposal to refer to the judicial guarantees of the Conventions, including Article 105 of the Third Convention, was not retained.[582] In the end, the wording 'judicial guarantees which are recognized as indispensable by civilized peoples' was adopted without listing any specific guarantees. The delegates did not, however, leave the interpretation entirely open since the sentence provides that the guarantees must be 'recognized as indispensable by civilized peoples'. The formulation 'recognized as indispensable by civilized peoples' was replaced in the ICC Elements of Crimes with 'generally recognized as indispensable under international law',[583] and this is how it should be interpreted nowadays.

720 While common Article 3 does not list specific judicial guarantees, Article 6 of Additional Protocol II does, and the requirement of fair trial in common Article 3 today has to be interpreted in the light of these provisions and their customary equivalent.[584] As follows from the phrase 'in particular' in Article 6, this list is not exhaustive but spells out the minimum guarantees of fair trial that are generally recognized as indispensable under international law today.[585]

Judgment, 2001, paras 203–207; *Rutaganda* Appeal Judgment, 2003, paras 39–41; and *Nahimana* Appeal Judgment, 2007, paras 47–50.

[581] UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22. In a number of cases such courts were found to fall short. See e.g. UN Human Rights Committee, *Espinoza de Polay* v. *Peru*, Views, 1997, para. 8; African Commission on Human and Peoples' Rights, *Constitutional Rights Project* v. *Nigeria*, Decision, 1995, para. 8; *Civil Liberties Organisation and others* v. *Nigeria*, Decision, 2001, paras 25, 27 and 43–44; European Court of Human Rights, *Findlay* v. *UK*, Judgment, 1997, paras 73–77; *Çiraklar* v. *Turkey*, Judgment, 1998, para. 38; *Mehdi Zana* v. *Turkey*, Judgment, 2001, paras 22–23; *Şahiner* v. *Turkey*, Judgment, 2001, paras 45–47; Inter-American Commission on Human Rights, *Case 11.084 (Peru)*, Report, 1994, section V(3); and Inter-American Court of Human Rights, *Castillo Petruzzi and others* v. *Peru*, Judgment, 1999, paras 132–133. For more details, see Doswald-Beck, 2011, pp. 337–344.

[582] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 83–84.

[583] ICC Elements of Crimes (2002), Article 8(2)(c)(iv).

[584] See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4597.

[585] This list is supported by various human rights law instruments. See, in particular, International Covenant on Civil and Political Rights (1966), Article 14; European Convention on Human

The judicial guarantees listed in Article 6 of Additional Protocol II are considered customary today.[586]

721 Thus, judicial guarantees that are generally recognized as indispensable today include, as a minimum:

- the right of the accused to be judged by an independent and impartial court;[587]
- the obligation to inform the accused without delay of the nature and cause of the offence alleged;[588]
- the requirement that an accused have the necessary rights and means of defence;[589]
- the right not to be convicted of an offence except on the basis of individual penal responsibility;[590]
- the principle of *nullum crimen, nulla poena sine lege* ('no crime or punishment without a law') and the prohibition of a heavier penalty than that provided for at the time of the offence;[591]
- the right to be presumed innocent;[592]
- the right to be tried in one's own presence;[593]

Rights (1950), Article 6; American Convention on Human Rights (1969), Article 8; and African Charter on Human and Peoples' Rights (1981), Article 7.

[586] See ICRC, Customary International Humanitarian Law, practice relating to Rule 100, https://www.icrc.org/customary-ihl/eng/docs/v2_rul.

[587] See paras 714–718 of this commentary and Article 6(2) of Additional Protocol II. See also Third Convention, Article 84(2), and Additional Protocol I, Article 75(4).

[588] Additional Protocol II, Article 6(2)(a). See also Third Convention, Articles 104(2)(3) and 105(4), and Additional Protocol I, Article 75(4)(a). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(3)(a); European Convention on Human Rights (1950), Article 6(3)(a); and American Convention on Human Rights (1969), Article 8(2)(b).

[589] Additional Protocol II, Article 6(2)(a). See also Third Convention, Articles 84(2), 99(3) and 105, and Additional Protocol I, Article 75(4)(a). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(3); European Convention on Human Rights (1950), Article 6(3); American Convention on Human Rights (1969), Article 8(2); and African Charter on Human and Peoples' Rights (1981), Article 7(c).

[590] Additional Protocol II, Article 6(2)(b). See also Third Convention, Article 87(3); Additional Protocol I, Article 75(4)(b); and ICRC Study on Customary International Humanitarian Law (2005), Rule 102.

[591] Additional Protocol II, Article 6(2)(c). See also Third Convention, Articles 87(1) and 99(1); Additional Protocol I, Article 75(4)(c); and ICRC Study on Customary International Humanitarian Law (2005), Rule 101. In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 15; European Convention on Human Rights (1950), Article 7; American Convention on Human Rights (1969), Article 9; and African Charter on Human and Peoples' Rights (1981), Article 7(2).

[592] Additional Protocol II, Article 6(2)(d). See also Additional Protocol I, Article 75(4)(d). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(2); European Convention on Human Rights (1950), Article 6(2); American Convention on Human Rights (1969), Article 8(2); and African Charter on Human and Peoples' Rights (1981), Article 7(1)(b).

[593] Additional Protocol II, Article 6(2)(e). See also Additional Protocol I, Article 75(4)(e). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(3)(d). On the issue of trial *in absentia*, see the commentary on Article 129, para. 5137.

– the right not to be compelled to testify against oneself or to confess guilt;[594]
– the right to be advised of one's judicial and other remedies and of the time limits within which they may be exercised.[595]

For more details on these judicial guarantees, see the commentary on Article 6 of Additional Protocol II.

722 A similar list is provided in Article 75 of Additional Protocol I, which has also been found to be relevant in this context.[596] Both lists were inspired by the 1966 International Covenant on Civil and Political Rights.[597] Article 75 lists three additional guarantees:

– the right to present and examine witnesses;[598]
– the right to have the judgment pronounced publicly;[599]
– the right not to be prosecuted or punished more than once by the same Party for the same act or on the same charge (*non bis in idem*).[600]

[594] Additional Protocol II, Article 6(2)(f). See also Third Convention, Article 99(2), and Additional Protocol I, Article 75(4)(f). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(3)(g); and American Convention on Human Rights (1969), Article 8(2)(g) and (3). This right is not explicitly stipulated in the 1950 European Convention on Human Rights, but it has been interpreted by the European Court of Human Rights as one of the elements of fair trial under Article 6(1); see e.g. *Pishchalnikov* v. *Russia*, Judgment, 2009, para. 71.

[595] Additional Protocol II, Article 6(3). See also Third Convention, Articles 106 and 107(1), and Additional Protocol I, Article 75(4)(j). Human rights instruments guarantee a right to appeal; see International Covenant on Civil and Political Rights (1966), Article 14(5); Convention on the Rights of the Child (1989), Article 40(2)(b)(v); American Convention on Human Rights (1969), Article 8(2)(h); African Charter on Human and Peoples' Rights (1981), Article 7(1)(a); and Protocol 7 to the European Convention on Human Rights (1984), Article 2(1). 'The influence of human rights law on this issue is such that it can be argued that the right of appeal proper – and not only the right to be informed whether appeal is available – has become a basic component of fair trial rights in the context of armed conflict'; Henckaerts/Doswald-Beck, commentary on Rule 100, pp. 369–370.

[596] See e.g. United States, Supreme Court, *Hamdan case*, Judgment, 2006, pp. 632–634. (The Court looked to Article 75 of Additional Protocol I, noting that even though the United States had not ratified the Protocol, the US government did not have a problem with Article 75, and Article 75 lays out many of the minimum requirements. Furthermore, the United States is a party to the 1966 International Covenant on Civil and Political Rights, which contains many of these same fair trial requirements. The Court determined that the military commissions violated the basic principles that an accused must have access to the evidence against him and must be present at the trial.) See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 3084, and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 16.

[597] On the relevance of the International Covenant on Civil and Political Rights, see e.g. United Kingdom, *Manual of the Law of Armed Conflict*, 2004, para. 15.30.5, and United States, Supreme Court, *Hamdan case*, Judgment, 2006, pp. 632–634.

[598] Additional Protocol I, Article 75(4)(g). See also Third Convention, Article 105(1) and (3). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(3)(e); European Convention on Human Rights (1950), Article 6(3)(d); and American Convention on Human Rights (1969), Article 8(2)(f).

[599] Additional Protocol I, Article 75(4)(i). In the context of human rights, see International Covenant on Civil and Political Rights (1966), Article 14(1); European Convention on Human Rights (1950), Article 6(1); and American Convention on Human Rights (1969), Article 8(5).

[600] Additional Protocol I, Article 75(4)(h). See also Third Convention, Article 86, and Fourth Convention, Article 117(3). In the context of human rights, see International Covenant on

723 The first two of these additional guarantees were not included in Additional Protocol II in response to the wish of some delegates to keep the list as short as possible.[601] Arguably, however, they should apply in non-international armed conflict to the extent that they are essential to a fair trial and they appear in the main human rights instruments. The third guarantee, the principle of *non bis in idem*, was not included because 'this principle could not apply between the courts of the government and the courts of the rebels'.[602] It may thus be argued, *a contrario*, that it should apply as a prohibition on double jeopardy of prosecution or punishment by the same Party, in the same manner as this principle is formulated in Article 75 of Additional Protocol I. A second trial by the same Party for the same act or on the same charge, after a final judgment acquitting or convicting the person concerned, should be deemed unfair.

724 As already noted, the lists in both Additional Protocols are illustrative and not limitative. Their cumulative effect is to ensure the accused receives a fair trial. Each right should be applied in such a way that a fair trial is guaranteed. Human rights instruments furthermore include the right to be tried 'without undue delay' or 'within a reasonable time'.[603] This principle is also set forth in Article 103 of the Third Convention but not in Article 6 of Additional Protocol II or in Article 75 of Additional Protocol I. However, undue delay could also taint a trial in the context of a non-international armed conflict and should thus be taken into account to assess the fairness of such a trial. The right to be tried 'within a reasonable time' may involve a specific assessment in the 'exceptional circumstances' of being at sea.[604]

d. Courts convened by non-State armed groups

725 In practice, non-State armed groups are known to have convened courts, in particular to try their own members for criminal offences related to the armed conflict.[605] Although the establishment of such courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain 'law and order' and to ensure

Civil and Political Rights (1966), Article 14(7); Protocol 7 to the European Convention on Human Rights (1984), Article 4; and American Convention on Human Rights (1969), Article 8(4).

601 Bothe/Partsch/Solf, p. 745.

602 *Ibid.*

603 International Covenant on Civil and Political Rights (1966), Article 14(3)(c); European Convention on Human Rights (1950), Article 6(1); American Convention on Human Rights (1969), Article 8(1); African Charter on Human and Peoples' Rights, Article 7(1)(d).

604 See e.g. European Court of Human Rights, *Medvedyev and others* v. *France*, Judgment, 2010, paras 62–27 and 127–134.

605 See examples of practice provided by Sivakumaran, 2009, pp. 490–495, and 2012, pp. 550–555; Somer, pp. 678–682; and Willms, pp. 22–24.

respect for humanitarian law.[606] Armed groups are frequently called upon to ensure respect for humanitarian law, for example by the UN Security Council.[607]

726 The application of the doctrine of command responsibility to non-international armed conflict bolsters this assessment.[608] According to this doctrine, commanders of armed groups would be criminally responsible if they knew, or had reason to know, that their subordinates committed war crimes and did not take all necessary and reasonable measures in their power to punish the persons responsible.[609] In *Bemba*, the ICC considered the availability of a judicial system through which a commander of a non-State armed group could have punished war crimes as an important element in the application of this doctrine in practice.[610] Whereas the Appeal Chamber did not specifically discuss the availability or otherwise of judicial authorities, the limitations of the commander's ability to investigate and prosecute crimes informed the Chamber's assessment of the necessary and reasonable measures that the commander could have taken in the circumstances.[611]

727 These courts, even if not recognized as legitimate by the State, are subject to the requirement of fair trial in common Article 3. This follows from paragraph 1 of common Article 3, which reads 'each Party to the conflict shall be bound to apply'.

728 Common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group.[612] Alternatively, armed groups could continue to operate existing courts applying existing legislation.

[606] Sivakumaran, 2009, pp. 490 and 497, and 2012, p. 550; Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts', *Journal of International Criminal Justice*, Vol. 16, No. 2, May 2018, pp. 235–263; Sweden, Stockholm District Court, *Haisam Omar Sakhanh case*, Judgment, 2017, paras 26–31.

[607] See e.g. UN Security Council, Res. 1479 (2003) on Côte d'Ivoire, para. 8; Res. 1509 (2003) on Liberia, para. 10; Res. 1962 (2010) on Côte d'Ivoire, para. 9; Res. 1933 (2010) on Côte d'Ivoire, para. 13; Res. 2041 (2012) on Afghanistan, para. 32; and Res. 2139 (2014) on Syria, para. 3.

[608] Sivakumaran, 2009, p. 497, and 2012, p. 557; Sassòli, 2010, p. 35; Somer, p. 685.

[609] ICRC Study on Customary International Humanitarian Law (2005), Rule 152.

[610] ICC, *Bemba* Decision on the Confirmation of Charges, 2009, para. 501, and Trial Judgment, 2016, paras 205–209. See also Sweden, Stockholm District Court, *Haisam Omar Sakhanh case*, Judgment, 2017, paras 29 and 31.

[611] ICC, *Bemba* Appeal Judgment, 2018, paras 173, 180 and 189.

[612] See Bond, p. 372; Sivakumaran, 2009, pp. 499–500, and 2012, p. 306; Somer, pp. 687–689; and Willms, p. 6. The UK military manual notes that 'the use of the bare word "law" [in Article 6(2)(c) of Additional Protocol II] … could also be wide enough to cover "laws" passed by an insurgent authority'; *Manual on the Law of Armed Conflict*, 2004, p. 404, para. 15.42, fn. 94. According to Bothe/Partsch/Solf, p. 746, '[t]here is no basis for the concept that the rebels are prevented from changing the legal order existing in the territory where they exercise factual power'. The

729 This difficulty in interpreting common Article 3 was recognized at the 1974–77 Diplomatic Conference. As a result, the requirement of a regularly constituted court was replaced in Additional Protocol II with the requirement of a court 'offering the essential guarantees of independence and impartiality'. The formula in Protocol II was taken from Article 84 of the Third Convention and did not meet any opposition from the Conference delegates.[613]

730 No trial should be held, whether by State authorities or by non-State armed groups, if these guarantees cannot be provided. Whether an armed group can hold trials providing these guarantees is a question of fact and needs to be determined on a case-by-case basis.[614] If a fair trial cannot be provided, other forms of detention may be considered, in particular internment for security reasons (see section H). In such a case, the prohibition of arbitrary detention must be respected.[615]

731 The above analysis is offered for the purposes of assessing an armed group's compliance with the requirements of common Article 3. Nothing in the article implies that a State must recognize or give legal effect to the results of a trial or other judicial proceeding conducted by a non-State Party to the conflict. This is consistent with the final paragraph of common Article 3 with respect to the legal status of such Parties.

6. *Sexual violence*

a. *Introduction*

732 While common Article 3 does not explicitly prohibit sexual violence, it does so implicitly because it establishes an obligation of humane treatment and prohibits violence to life and person, including mutilation, cruel treatment, torture and outrages upon personal dignity.

733 The term 'sexual violence' is used to describe any act of a sexual nature committed against any person under circumstances which are coercive.[616] Coercive circumstances include force, threat of force, or coercion caused, for example, by fear of violence, duress, detention, psychological oppression or

European Court of Human Rights has held that '[i]n certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis" reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees'; *Ilaşcu and others* v. *Moldova and Russia*, Judgment, 2004, para. 460.

613 Sandoz/Swinarksi/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4600.

614 See generally Sivakumaran, 2009; Somer; and Willms.

615 ICRC Study on Customary International Humanitarian Law (2005), Rule 99.

616 See ICTR, *Akayesu* Trial Judgment, 1998, para. 688. For an overview of this concept in armed conflicts, see e.g. Durham; Gardam/Jarvis; Haeri/Puechguirbal; Brammertz/Jarvis; and Viseur Sellers/Rosenthal.

abuse of power.[617] Also included are situations where the perpetrator takes advantage of a coercive environment or a person's incapacity to give genuine consent.[618] The force, threat of force or coercion can be directed against either the victim or another person.[619] Sexual violence also comprises acts of a sexual nature a person is caused to engage in by the circumstances described above.[620]

734 Sexual violence encompasses acts such as rape, enforced prostitution,[621] indecent assault,[622] sexual slavery, forced pregnancy and enforced sterilization.[623] Other examples gleaned from decisions of international criminal tribunals include forced public nudity,[624] sexual harassment, such as forced stripping,[625] and mutilation of sexual organs.[626] Sexual violence has also been considered to include acts such as forced marriage, forced inspections for virginity, sexual exploitation, such as obtaining sexual services in return for food or protection, forced abortions,[627] and trafficking for sexual exploitation.[628]

735 As explained below, the case law and statutes of international criminal tribunals show that sexual violence can amount to one or more prohibited acts listed in common Article 3. Often such acts will not fall into only one of the categories of prohibited acts under common Article 3 but may constitute, for example, both 'violence to life and person' and 'outrages upon personal dignity'. In addition, sexual violence may occur as a succession of prohibited acts, for example rape being accompanied by murder or forced public nudity.[629]

[617] See ICC Elements of Crimes (2002), Article 8(2)(e)(vi)-6; see also Articles 7(1)(g)-6 and 8(2)(b)(xxii)-6, and WHO, *World report on violence and health*, Geneva, 2002, pp. 149–181.

[618] The ICC Elements of Crimes notes in footnotes to the war crime of rape, which also applies to the war crime of sexual violence: 'It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.'

[619] See ICC Elements of Crimes (2002) Article 8(2)(e)(vi)-6.

[620] *Ibid.* See also ICTY, *Delalić* Trial Judgment, 1998, para. 1066.

[621] See Additional Protocol II, Article (4)(2)(e). See also Fourth Convention, Article 27, and Additional Protocol I, Article 75(2)(b). Rape and enforced prostitution are listed as war crimes in Article 8(2)(e)(vi) of the 1998 ICC Statute, in Article 4(e) of the 1994 ICTR Statute, in Section 6(1)(e)(vi) of UNTAET Regulation No. 2000/15 and in Article 3(e) of the 2002 SCSL Statute.

[622] See Additional Protocol II, Article (4)(2)(e). See also Fourth Convention, Article 27, and Additional Protocol I, Article 75(2)(b). Indecent assault is listed as a war crime in Article 4(e) of the 1994 ICTR Statute and Article 3(e) of the 2002 SCSL Statute.

[623] Sexual slavery, forced pregnancy and enforced sterilization are listed as war crimes in Article 8(2)(e)(vi) of the 1998 ICC Statute and Section 6(1)(e)(vi) of UNTAET Regulation No. 2000/15.

[624] ICTR, *Akayesu* Trial Judgment, 1998, para. 688. See also ICTY, *Kunarac* Trial Judgment, 2001, paras 766–774.

[625] ICTR, *Akayesu* Trial Judgment, 1998, para. 693. See also Bastick/Grimm/Kunz, p. 19.

[626] See ICTR, *Bagosora* Trial Judgment, 2008, para. 976.

[627] For all these examples, see Bastick/Grimm/Kunz, p. 19; WHO, *World report on violence and health*, Geneva, 2002, p. 149 and WHO, *Guidelines for medico-legal care for victims of sexual violence*, Geneva, 2003, p. 7.

[628] Trafficking for sexual exploitation will often come within the definition of enforced prostitution but may involve, for example, the sexual exploitation of persons for pornography. See Inter-Agency Standing Committee, *Guidelines for Integrating Gender-based Violence Interventions in Humanitarian Action*, p. 6. See also Protocol on Trafficking in Persons (2000), Article 3.

[629] See e.g. ICTR, *Bagosora* Trial Judgment, 2008, para. 933.

736 Article 27(2) of the Fourth Convention provides specifically for the protection of women against rape, enforced prostitution and indecent assault.[630] Article 14(2) of the Third Convention requires that women be 'treated with all the regard due to their sex', which includes an obligation to proactively try to prevent sexual violence against them.[631] Today, however, the prohibition of sexual violence is recognized to encompass violence not only against women and girls, but any person, including men and boys.[632] Both Article (4)(2)(e) of Additional Protocol II and Article 75(2)(b) of Additional Protocol I prohibit acts of sexual violence regardless of the sex of the victim.[633] The same is true under customary international law.[634] The statutes of international criminal courts and tribunals also define crimes of sexual violence in gender-neutral terms.[635] While the majority of victims of sexual violence in armed conflict are women and girls, men and boys are also frequently victims of sexual violence, in particular when held in detention facilities.[636]

b. The prohibition of sexual violence under common Article 3

i. Sexual violence and the requirement of humane treatment

737 Sexual violence is prohibited by common Article 3 as it amounts to a violation of the obligation of humane treatment of persons taking no active part in hostilities. Rape, enforced prostitution and indecent assault are listed as examples of treatment that is considered inhumane in Article 27 of the Fourth Convention. Therefore, these acts should also be considered inhumane in the context of common Article 3.[637]

ii. Sexual violence and the prohibition of violence to life and person, in particular mutilation, cruel treatment and torture

738 Sexual violence will often fall within the prohibition of 'violence to life and person' and has been found to amount to torture, mutilation or cruel treatment.

739 The ICTY and the ICTR have held that rape and some other forms of sexual violence may constitute torture. Both Tribunals, as well as some human rights bodies, found rape *per se* to meet the threshold of severity for torture, as it

[630] See also Additional Protocol I, Article 76(1).
[631] For a discussion of the meaning of this obligation, see the commentary on Article 14, section D.2.
[632] With the exception of forced pregnancy, forced abortion and forced inspection of virginity, which, by their nature, can only be committed against women and girls.
[633] Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 3049.
[634] Henckaerts/Doswald-Beck, commentary on Rule 93, p. 327.
[635] See ICTR Statute (1994), Article 4(e); ICC Statute (1998), Article 8(2)(e)(vi); UNTAET Regulation No. 2000/15, Section 6(1)(e)(vi); and SCSL Statute (2002), Article 3(e).
[636] See Lindsey, p. 29; Solangon/Patel, pp. 417–442; and Sivakumaran, 2010b.
[637] In the context of crimes against humanity, inhumane acts have been found to include sexual violence; see e.g. ICTR, *Muvunyi* Trial Judgment, 2006, para. 528; *Kamuhanda* Trial Judgment, 2004, para. 710; and SCSL, *Brima* Appeal Judgment, 2008, para. 184.

necessarily implies severe pain and suffering.[638] For example, in *Kunarac*, the ICTY Appeals Chamber held that '[s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture'.[639] The ICTY also considered that being forced to watch sexual attacks on an acquaintance was torture for the forced observer.[640]

740 Acts of sexual violence have also been held to amount to mutilation and cruel or inhuman treatment. In *Prlić*, the ICTY Trial Chamber held that 'any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment'.[641] Involuntary sterilization has been found to amount to cruel treatment.[642] An example of mutilation in the context of sexual violence is the mutilation of sexual organs.[643]

iii. Sexual violence and the prohibition of outrages upon personal dignity

741 The prohibition of 'outrages upon personal dignity' contained in common Article 3 covers acts of sexual violence. This understanding has been confirmed by the subsequent inclusion of some acts of sexual violence as outrages upon personal dignity in Article (4)(2)(e) of Additional Protocol II and in the statutes of international criminal tribunals. Article (4)(2)(e) of Additional Protocol II explicitly lists 'rape, enforced prostitution and any form of indecent assault' as outrages upon personal dignity.[644] The ICTR and SCSL Statutes also list

[638] See ICTY, *Brđanin* Trial Judgment, 2004, para. 485; *Stanišić and Župljanin* Trial Judgment, 2013, para. 48; *Delalić* Trial Judgment, 1998, para. 495; *Kunarac* Appeal Judgment, 2002, para. 151; and ICTR, *Akayesu* Trial Judgment, 1998, para. 682. For examples taken from human rights law, see European Court of Human Rights, *Aydin* v. *Turkey*, Judgment, 1997, paras 82–86; UN Committee against Torture, *T.A.* v. *Sweden*, Decisions, 2005, paras 2.4 and 7.3; Inter-American Commission on Human Rights, *Case 10.970 (Peru)*, Report, 1996, p. 185; and *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.

[639] ICTY, *Kunarac* Appeal Judgment, 2002, para. 150.

[640] ICTY, *Furundžija* Trial Judgment, 1998, para. 267. See also *Kvočka* Trial Judgment, 2001, para. 149. The Inter-American Commission on Human Rights found that being forced to witness others being raped amounted to cruel treatment; see *Case 11.565 (Mexico)*, Report, 1999, para. 53.

[641] ICTY, *Prlić* Trial Judgment, 2013, Vol. 1, para. 116. There is no difference between the notion of 'inhuman treatment' committed in an international armed conflict and the notion of 'cruel treatment' prohibited under common Article 3; see the commentary on Article 130, para. 5247.

[642] UN Committee against Torture, *Consideration of reports submitted by States Parties under Article 19 of the Convention: Peru*, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

[643] See e.g. ICTR, *Bagosora* Trial Judgment, 2008, para. 2266; *Kajelijeli* Trial Judgment, 2003, paras 935–936; ICTY, *Tadić* Trial Judgment, 1997, paras 45 and 237; UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/2002/83/Add.3, 11 March 2002, para. 42; and Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, New York, September 1996.

[644] This wording in Additional Protocol II was taken directly from Article 27 of the Fourth Convention. See *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. X, p. 104.

rape, enforced prostitution and any form of indecent assault as outrages upon personal dignity under common Article 3.[645]

742 International tribunals have held on numerous occasions that sexual violence falls under the category of outrages upon personal dignity, including humiliating and degrading treatment. Examples of sexual violence held to be degrading or humiliating treatment include rape,[646] forced public nudity,[647] sexual slavery, including the abduction of women and girls as 'bush wives', a conjugal form of sexual slavery,[648] sexual assault,[649] or enduring the constant fear of being subjected to physical, mental or sexual violence.[650] In *Bagosora*, the ICTR Trial Chamber found the accused guilty of outrages upon personal dignity for rape as a violation of common Article 3 and of Additional Protocol II.[651]

743 Lastly, it is also important to note that some acts of sexual violence have been recognized to amount to distinct war crimes in international and non-international armed conflicts and included as such in the ICC Statute.[652]

7. Non-refoulement *under common Article 3*

744 Because of the fundamental rights it protects, common Article 3 should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer. The prohibition on such transfer is commonly known as '*non-refoulement*'.

745 The principle of *non-refoulement*, in its traditional sense, prohibits the transfer of a person from one State to another in any manner whatsoever if there are substantial grounds for believing that the person would be in danger of suffering the violation of certain fundamental rights in the jurisdiction of that State. This is especially recognized in respect of torture or cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life (including as the result of a death sentence pronounced without the fundamental guarantees of fair trial), or persecution on account of race, religion, nationality, membership of a particular social group or political opinion. The principle of *non-refoulement* is expressed, with some variation in scope, in a number of

[645] See ICTR Statute (1994), Article 4(e), and SCSL Statute (2002), Article 3(e).
[646] ICTY, *Furundžija* Trial Judgment, 1998, paras 270–275; ICTR, *Ndindiliyimana* Trial Judgment, 2011, para. 2158.
[647] ICTY, *Kunarac* Trial Judgment, 2001, paras 766–774.
[648] SCSL, *Taylor* Trial Judgment, 2012, para. 432.
[649] ICTY, *Furundžija* Trial Judgment, 1998, para. 272.
[650] ICTY, *Kvočka* Trial Judgment, 2001, para. 173.
[651] ICTR, *Bagosora* Trial Judgment, 2008, para. 2254.
[652] ICC Statute (1998), Article 8(2)(e)(vi)1–6: war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence constituting a serious violation of common Article 3. See also UNTAET Regulation No. 2000/15, Section 6(1)(e)(vi).

international legal instruments, including in humanitarian law, refugee law, human rights law and some extradition treaties.[653] It is also, in its core, a principle of customary international law.[654]

746 Common Article 3 does not contain an explicit prohibition of *refoulement*. However, in the ICRC's view, the categorical prohibitions in common Article 3 would also prohibit a transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to life and person, such as murder or torture and other forms of ill-treatment.[655] While the arguments in favour of reading a *non-refoulement* obligation into humanitarian law applicable in non-international armed conflict have been said to be 'extremely tenuous',[656] some government experts have, in contrast, noted that such an obligation 'is already implicit in existing IHL'.[657] Indeed, in the same way that the Geneva Conventions prohibit circumvention of the protection owed to protected persons in international armed conflict by transfer to a non-compliant High Contracting Party,[658] humanitarian law applicable in non-international armed conflict should not be circumvented by transferring persons to another Party to the conflict, or to another State, international organization or other authority not

[653] The Third Convention prohibits States Parties from transferring prisoners of war to States that are not willing and able to apply the Third Convention (Article 12); the Fourth Convention prohibits the transfer of protected persons to States that are not willing and able to apply the Fourth Convention and stipulates that '[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs' (Article 45). Other treaties that specifically prohibit *refoulement* include: Refugee Convention (1951), Article 33; OAU Convention Governing Refugee Problems in Africa (1969), Article II(3); Convention against Torture (1984), Article 3; Convention on Enforced Disappearance (2006), Article 16(1); American Convention on Human Rights (1969), Article 22(8); Inter-American Convention against Torture (1985), Article 13(4); and EU Charter of Fundamental Rights (2000), Article 19(2). See also Bangkok Principles on Status and Treatment of Refugees (2001), Article III(1). This commentary does not deal with a State's obligations not to *refoule* en masse persons seeking to enter its territory when fleeing a situation of armed conflict.

[654] UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994; UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007, paras 15 and 21. See also Lauterpacht/Bethlehem, pp. 87–177, and Hathaway, pp. 503–536.

[655] See Gisel.

[656] Françoise J. Hampson, 'The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict', in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014, pp. 373–385, at 385.

[657] ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 23.

[658] See, especially, Third Convention, Article 12; Fourth Convention, Article 45; and common Article 1 of the four Geneva Conventions.

party to the conflict.[659] Arguably, this would be true for all of the fundamental guarantees in common Article 3, including humane treatment, as well as the prohibition of hostage-taking and of the passing of sentences without affording all judicial guarantees.[660] For the last case, however – and considering also the more restrictive interpretation in human rights jurisprudence – the prohibition of *non-refoulement* would probably be confined at most to trials that are manifestly unfair.[661]

747 To a certain extent, this logic is also enshrined in Article 5(4) of Additional Protocol II, which requires authorities who decide to release a person to take 'necessary measures to ensure their safety'. It is also a principle that was invoked, and put into practice, in relation to the return of prisoners of war in accordance with Article 118 of the Third Convention, even though the text of that article does not explicitly refer to *non-refoulement*.[662]

748 Last but not least, common Article 1 of the Geneva Conventions contains the obligation to 'ensure respect' for the Conventions.[663] If a Party to the conflict transfers a detainee to another authority, under the custody of which the detainee would be in danger of being subjected to a violation of their

[659] During ICRC expert consultations, '[m]any experts agreed that common Article 3 would at least prohibit a party to a NIAC [non-international armed conflict] from circumventing the Article's rules by deliberately transferring a detainee to another party that would violate them'. ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 23. See also ICTY, *Mrkšić* Appeal Judgment, 2009, paras 70–71.

[660] See Copenhagen Process: Principles and Guidelines (2012), Commentary, para. 15.4 ('In transfer situations, it is important to ensure that the detainee who is to be transferred is not subject to a real risk of violations that breach international law obligations concerning humane treatment and due process.')

[661] European Court of Human Rights, *Mamatkulov and Askarov* v. *Turkey*, Judgment, 2005, para. 90; UN Human Rights Committee, *Yin Fong* v. *Australia*, Views, 2009, para. 9.7.

[662] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, pp. 547–548:

> No exception may be made to this rule [that the Detaining Power must repatriate prisoners of war without delay after the cessation of active hostilities] unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually.

See also ICRC, *Annual Report 1987*, ICRC, Geneva, p. 77; ICRC, *Annual Report 1991*, ICRC, Geneva, pp. 111–112; ICRC, *Annual Report 1992*, ICRC, Geneva, pp. 141–142; ICRC, *Annual Report 2000*, ICRC, Geneva, p. 201. See, further, Alain Aeschlimann, 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 83–122, at 104–105; and Meron, 2000, pp. 253–256.

[663] ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 24 (which recalls that some experts regarded transfer obligations 'as part of a State's obligations under common Article 1 to take appropriate measures to ensure that other States respect IHL'); Horowitz, pp. 50–51. Reuven (Ruvi) Ziegler develops this argument for the transfer of detainees by non-belligerent States to States party to a non-international armed conflict in 'Non-Refoulement between "Common Article 1" and "Common Article 3"', in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014, pp. 386–408.

fundamental rights enshrined in common Article 3, that Party to the conflict would not have done all it could to ensure respect for common Article 3.[664]

749 The interpretation that common Article 3 would prohibit *refoulement* is reinforced by the fact that the absolute prohibition of torture, cruel treatment or outrages upon personal dignity in common Article 3 should be interpreted 'in light of the parallel provisions in human rights law'.[665] Indeed, the logic for common Article 3 is the same: if the absolute prohibitions in human rights law mean that authorities must not only refrain from subjecting persons to such treatment but also from transferring them to places where they will be subjected to such treatment, there is no reason why it should not be the same under humanitarian law.[666] Furthermore, *non-refoulement* has also been found in international jurisprudence and by the UN Human Rights Committee to constitute an integral component of the protection of certain rights – in particular the right not to be subjected to torture, cruel, inhuman or degrading treatment, or arbitrary deprivation of life – even when not set down as a separate provision.[667]

750 In terms of who is bound by the prohibition of *refoulement*, the logic of common Article 3 requires that not only States, but also non-State Parties to non-international armed conflicts abide by it. The trigger for the *non-refoulement* principle is the transfer of control of the non-State Party to the control of another (State or non-State) authority. For instance, common Article 3 would prohibit a non-State Party to the conflict from returning a person to territory

[664] See Gisel, pp. 118–120.
[665] Droege, 2008, p. 675. See also Bellinger/Padmanabhan, p. 236, and Horowitz, p. 57.
[666] Droege, 2008, p. 675. See also Sanderson, pp. 798–799, and Byers.
[667] On torture, cruel, inhuman or degrading treatment, see paras 649–650. On Article 7 of the 1966 International Covenant on Civil and Political Rights, see UN Human Rights Committee, *General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 9, and *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 12, and case law. On Article 3 of the 1950 European Convention on Human Rights, see European Court of Human Rights, *Soering* v. *UK*, Judgment, 1989, paras 88–91; *Chahal* v. *UK*, Judgment, 1996, para. 74; and *El-Masri* v. *the former Yugoslav Republic of Macedonia*, Judgment, 2012, para. 212. Transfers that may trigger a chain of *refoulements* are also prohibited: see *Hirsi Jamaa and others* v. *Italy*, Judgment, 2012, paras 146–147, among others. The European Court of Human Rights has also held that States party to the Convention that have ratified its Protocol 13 of 2002 prohibiting the death penalty may also not return persons to States in which they risk facing the death penalty, regardless of the fairness of the trial: see *Al-Saadoon and Mufdhi* v. *UK*, Judgment, 2010, paras 115–120 and 137. See also UN Committee on the Rights of the Child, *General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, para. 28, which provides that in view of the high risk of irreparable harm involving fundamental human rights, including the right to life, States should not return children 'where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties'.

controlled by an adversary or to an allied non-State Party if there was a risk that the person would be ill-treated in that territory or at the hands of that Party, respectively.

751 Where foreign troops or authorities find themselves detaining or exercising authority and control over persons, the principle of *non-refoulement* will apply to any transfer of an individual by such authorities to the territory or control of another State (often the host State) or international organization.[668] If the foreign troops are under the command and control of an international organization, the prohibition of *refoulement* flows from customary law, which is binding on international organizations, and from the continued applicability of the humanitarian and human rights law obligations of States contributing troops to international organizations, even when these are operating abroad.[669] Some States involved in transfers by their forces abroad have however not accepted the application of the principle of *non-refoulement* in these situations.[670] This position has been criticized by human rights bodies.[671] In the ICRC's view, the principle of *non-refoulement* applies irrespective of the crossing of a border. What matters for the purposes of the *non-refoulement* principle under common Article 3 is a transfer of control over a person.[672]

[668] Droege, 2008, pp. 683–687. See also UN Department of Peacekeeping Operations, *Interim Standard Operating Procedures: Detention in United Nations Peace Operations*, 24 January 2010, para. 80.

[669] UN Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10; *Concluding observations: Belgium*, UN Doc. CCPR/CO/81/BEL, 12 August 2004, para. 6; *Comments by the Government of Germany to the Concluding Observations*, UN Doc. CCPR/CO/80/DEU/Add.1, 5 January 2005; *Concluding observations: Poland*, UN Doc. CCPR/CO/82/POL, 2 December 2004, para. 3; *Consideration of periodic reports: Italy*, UN Doc. CCPR/C/SR.1680, 24 September 1998, para. 22; *Consideration of periodic reports: Belgium*, UN Doc. CCPR/C/SR.1707, 27 October 1998, para. 22; and *Consideration of periodic reports: Canada*, UN Doc. CCPR/C/SR.1738, 7 March 1999, paras 29 and 32–33. See also UN Secretary-General's Bulletin (1999), Section 2. The human rights obligations of the host State may also apply; see UN Human Rights Committee, *Concluding observations: Kosovo (Republic of Serbia)*, UN Doc. CCPR/C/UNK/CO/1, 14 August 2006.

[670] See Gillard, pp. 712–715, and Bellinger/Padmanabhan, p. 237.

[671] See European Court of Human Rights, *Al-Saadoon and Mufdhi* v. *UK*, Judgment, 2010, para. 143; Committee against Torture, *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories*, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 5(e); UN Human Rights Committee, *Concluding observations: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16.

[672] While no treaty explicitly stipulates as much, this interpretation is consistent with the object and purpose of the prohibition against *refoulement*. In view of the Copenhagen Principles' focus on international military operations, its paragraph 15 primarily addresses transfer without border crossing, which is confirmed by the reference to 'host State' in its commentary; see Copenhagen Process: Principles and Guidelines (2012), para. 15(2). Some participants in the ICRC expert consultations also 'felt that any existing non refoulement obligation would prevail over any request by a host State to transfer', while others noted on the contrary that it might be difficult to justify it in some circumstances; see ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 33. See the references in fn. 670 of this commentary.

752 It follows from the prohibition of *refoulement* that a Party to the conflict that is planning to return or transfer a person to the control of another authority must assess carefully and in good faith whether there are substantial grounds for believing that the person would be subjected to torture, other forms of ill-treatment, arbitrary deprivation of life or persecution after transfer. If there are substantial grounds to believe so, the person must not be transferred unless measures are taken that effectively remove such risk. The assessment should cover the policies and practices of the receiving authorities and the personal circumstances and subjective fears of the individual detainee,[673] based on interviews with the detainee, the Detaining Power's own knowledge of the receiving authority's detention practices, and information from independent sources.[674]

753 In recent non-international armed conflicts, some States and international organizations have agreed upon and put in place various forms of post-transfer monitoring.[675] In most cases, the duration of the monitoring was meant to be commensurate with the period during which it had been assessed that the detainee would be in danger of being subjected to unlawful treatment. These post-transfer monitoring mechanisms notably granted the transferring authority access to the transferred detainees, so that it could monitor their welfare and base future transfer decisions on the findings, in some cases leading to the suspension of transfers.[676] The States and international organizations concerned also carried out various forms of capacity-building with regard to detention operations, including detainee treatment. If effective, such measures would also correspond to States' duty to ensure respect as provided for in common Article 1.

[673] ICRC, *Meeting of all States on Strengthening Humanitarian Law Protecting Persons Deprived of their Liberty: Chair's Conclusion*, 27–29 April 2015, p. 12.

[674] ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 25. While some experts suggested that circumstances could limit the need for individualized assessments, such need had been identified long ago with regard to the transfer of prisoners of war despite the absence of an express provision; Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 547. See also Droege, 2008, pp. 679–680; Gillard, pp. 731–738; and Gisel, pp. 125–127. For a partially different view, see Horowitz, p. 64.

[675] During the ICRC consultations, '[s]ome [State experts] considered [post-transfer monitoring] a legal obligation, while others considered it solely as a good practice'; ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 26. For examples of agreements putting in place post-transfer monitoring mechanisms, see Gisel, pp. 128–130, text in relation to fns 60–78.

[676] See Horowitz, pp. 57 and 61–64; *U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada*, Human Rights Institute, Columbia Law School, December 2010; and United Kingdom, High Court of Justice, *R (on the application of Maya Evans)* v. *Secretary of State for Defence*, Judgment, 2010, paras 287–327.

H. Detention outside a criminal process

754 Detention is a regular occurrence in both international and non-international armed conflicts and is practised by State and non-State Parties alike.[677] For detention in relation to a criminal process, common Article 3 imposes the obligation of fair trial (see section G.5).

755 This section deals with detention outside a criminal process, also known as internment. The term 'internment' refers to detention for security reasons in situations of armed conflict, i.e. the non-criminal detention of a person based on the serious threat that their activity poses to the security of the detaining authority in relation to an armed conflict.[678]

756 In international armed conflicts, the Third and Fourth Conventions regulate such detention in considerable detail.[679] In non-international armed conflicts, neither common Article 3 nor Additional Protocol II contain a similar framework for internment.[680] It is a requirement under customary international law, however, that any detention must not be arbitrary.[681] Therefore, certain grounds and procedure for such detention must be provided. At the time of writing, however, the question of which standards and safeguards are required in non-international armed conflict to prevent arbitrariness is still subject to debate and needs further clarification, in part linked to unresolved issues on the

[677] See e.g. 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, Res. 1, Strengthening international humanitarian law protecting persons deprived of their liberty, Preamble, para. 1 ('*mindful* that deprivation of liberty is an ordinary and expected occurrence in armed conflict . . .'); and Copenhagen Process: Principles and Guidelines (2012), Preamble, para. III ('Participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations.'). See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 17; and Dörmann, p. 349.

[678] Not every deprivation of liberty incidental to the conduct of military operations – for example, stops at checkpoints or restrictions on movement during searches – will amount to internment. But when deprivation of liberty reaches a certain temporal threshold or is motivated by a decision to detain an individual on account of the serious security threat they pose, the risk of arbitrariness must be mitigated by clarity on the grounds for internment and the required procedures.

[679] See, in particular, Third Convention, Article 21, and Fourth Convention, Articles 42 and 78.

[680] Article 5 of Additional Protocol II deals with the treatment of 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', but does not regulate the grounds and procedures for such deprivation of liberty.

[681] ICRC Study on Customary International Humanitarian Law (2005), Rule 99. See also Copenhagen Process: Principles and Guidelines (2012), commentary, para. 4.4:

> As an important component of lawfulness detentions must not be arbitrary. For the purposes of *The Copenhagen Process Principles and Guidelines* the term 'arbitrary' refers to the need to ensure that each detention continues to be legally justified, so that it can be demonstrated that the detention remains reasonable and lawful in all the circumstances. Justifying detention requires that the decision to detain is based in law on valid reasons that are reasonable and necessary in light of all the circumstances. Furthermore, detention cannot be a collective punishment. Detention therefore must serve a lawful and continuingly legitimate objective, such as a security objective or criminal justice.

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interplay between international humanitarian law and international human rights law.[682]

757 Another question that arises is whether detention may take place at sea. In international armed conflict, Article 22 of the Third Convention requires that prisoners of war be interned on land. While there is no rule explicitly addressing this issue for non-international armed conflict, '[t]he entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC'.[683] Hence, detention in a non-international armed conflict should in principle take place on land.[684]

758 The lack of sufficient rules in humanitarian law applicable in non-international armed conflict has become a legal and protection issue. Common Article 3 refers to detention in general, but only to indicate that persons in detention are entitled to its protection. The article is silent, however, on the grounds and procedural safeguards for persons interned in non-international armed conflict, even though, as mentioned, internment is practised by both States and non-State armed groups. Additional Protocol II explicitly mentions internment, thus confirming that it is a form of deprivation of liberty inherent to non-international armed conflict, but likewise does not refer to the grounds for internment or the procedural rights.

759 The ICRC has relied on 'imperative reasons of security' as the minimum legal standard that should inform internment decisions in non-international armed conflict. This standard was chosen because it emphasizes the exceptional nature of internment and is already in wide use if States resort to non-criminal detention for security reasons. It seems also to be appropriate in

[682] These issues, among others, were discussed during a consultation process on strengthening legal protection for victims of armed conflicts, facilitated by the ICRC based on Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011. See e.g. *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, pp. 10–11; *Strengthening international humanitarian law protecting persons deprived of their liberty, Concluding Report*, Document prepared by the ICRC for the 32nd International Conference of the Red Cross and Red Crescent, June 2015, pp. 12 and 20–21; 32nd International Conference of the Red Cross and Red Crescent, Res. 2, Strengthening compliance with international humanitarian law, para. 8; and Copenhagen Process: Principles and Guidelines (2012), Preamble, para. IV ('Participants recalled and reiterated the relevant obligations of States, international organisations, non-State actors and individuals under applicable international law, recognizing in particular the challenges of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law.').

[683] Pejic, 2005, p. 385. For an example of detention on board a ship where the ICRC had access, see Modarai *et al.*, pp. 834–835.

[684] See also Sivakumaran, 2012, p. 297 (describing fixed detention facilities as 'the preferred option'), and Hafetz, pp. 243–244 ('there is nevertheless a strong preference for holding detainees in NIACs [non-international armed conflicts] in fixed rather than mobile detention facilities'); see also fn. 318 and accompanying text on whether detention at sea would constitute inhumane treatment.

non-international armed conflict with an extraterritorial element, in which a foreign force, or forces, are detaining non-nationals outside their own territory, as the wording is based on the internment standard applicable in occupied territories under the Fourth Convention.[685] It also reflects a basic feature of humanitarian law, which is the need to strike a balance between the considerations of humanity, on the one hand, and of military necessity, on the other.

760 In an effort to address the uncertainty resulting from the silence of humanitarian treaty law on the procedure for deprivation of liberty in non-international armed conflict, the ICRC issued institutional guidelines entitled 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence'.[686] The guidelines are based on law and policy and are meant to be implemented in a manner that takes into account the specific circumstances at hand.[687] The ICRC has used the guidelines in its operational dialogue with States, international and regional forces, and other actors.

761 As regards the review process to determine the lawfulness of internment, the 12 specific guidelines provide that a person must, among other things, be informed promptly, in a language they understand, of the reasons for internment. An internee likewise has the right to challenge, with the least possible delay, the lawfulness of their detention.[688] The review of lawfulness of internment must be carried out by an independent and impartial body.[689] It should be noted that, in practice, mounting an effective challenge will presuppose the fulfilment of several procedural and practical steps, including: i) providing internees with sufficient evidence supporting the reasons for their internment; ii) ensuring that procedures are in place to enable internees to seek and obtain additional evidence; and iii) making sure that internees understand the various stages of the internment review process and the process as a whole. Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review body will require particular attention. Assistance of counsel should be provided whenever feasible, but other means of ensuring expert legal assistance may be considered as well.

[685] See Fourth Convention, Article 78.

[686] See Pejic, 2005; ICRC, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', 2007. These guidelines address internment/administrative detention, which they define as 'deprivation of liberty of a person that has been initiated/ordered by the executive branch … without criminal charges being brought against the internee/administrative detainee'. They do not address pretrial detention of a person held on criminal charges and they do not address the internment of prisoners of war in international armed conflict, for which there exists a separate legal framework under the Third Convention; see Articles 4–126.

[687] For the challenges posed by detention by non-State armed groups, see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019, pp. 54–55.

[688] For the legal sources and rationale for the formulation of this principle, see Pejic, 2005, pp. 385–386.

[689] For the legal sources and rationale for the formulation of this principle, see *ibid.* pp. 386–387.

762 The guidelines also provide for the right to periodical review of the lawfulness of continued internment. Periodical review obliges the detaining authority to ascertain whether the detainee continues to pose an imperative threat to security and to order release if that is not the case. The safeguards that apply to initial review are also to be applied at periodical review.

763 In a non-international armed conflict occurring in the territory of a State between State armed forces and one or more non-State armed groups, domestic law, informed by the State's human rights obligations, and humanitarian law, constitutes the legal framework for the possible internment by States of persons whose activity is deemed to pose a serious security threat.

764 The question whether humanitarian law provides inherent authority or power to detain is, however, still subject to debate.[690] This issue has led to controversy particularly in non-international armed conflicts with an extraterritorial element, i.e. those in which the armed forces of one or more State, or of an international or regional organization, fight alongside the armed forces of a host State against one or more non-State armed groups.

765 One view is that a legal basis for deprivation of liberty in non-international armed conflict has to be explicit, as is the case in the Third and Fourth Conventions for international armed conflict.[691] Another view, shared by the ICRC, is that both customary and international humanitarian treaty law contain an inherent power to detain in non-international armed conflict.[692] However, additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality.[693]

[690] See e.g. 'Expert meeting on procedural safeguards for security detention in non-international armed conflict, Chatham House and International Committee of the Red Cross, London, 22–23 September 2008', *International Review of the Red Cross*, Vol. 91, No. 876, December 2009, pp. 859–881.

[691] See e.g. United Kingdom, England and Wales High Court, *Serdar Mohammed and others* v. *Ministry of Defence*, Judgment, 2014, paras 239–294; and England and Wales Court of Appeal, Appeal Judgment, 2015, paras 164–253. In the subsequent UK Supreme Court judgment in this case in 2017, the majority found it unnecessary to express a view on whether customary international law authorizes the detention of enemy combatants in non-international armed conflict (United Kingdom Supreme Court, *Al-Waheed and Another* v. *Ministry of Defence*, Judgment, 17 January 2017, paras 14, 113, 148 and 224). The majority held that authority to capture and detain enemy combatants for imperative reasons of security was 'in principle' conferred by the relevant UN Security Council resolutions (paras 30, 119, 164 and 224).

[692] See 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, Res. 1, Strengthening international humanitarian law protecting persons deprived of their liberty, Preamble, para. 1; ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper, November 2014, p. 7; and Jann K. Kleffner, 'Operational Detention and the Treatment of Detainees', in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd edition, Oxford University Press, 2015, pp. 518–532, at 524–525; and Pejic, 2020, p. 289.

[693] See ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper, November 2014, p. 8.

I. Subparagraph (2): Collection and care of the wounded and sick

1. Introduction

766 Common Article 3 extends specific legal protection to the wounded and sick on land (as well as to the shipwrecked by virtue of Article 3 of the Second Convention) in times of non-international armed conflict. It contains two core obligations in this regard: the wounded and sick must be a) collected and b) cared for. Although concise, when interpreted in conjunction with the other obligations and protections in common Article 3, it provides the foundation for comprehensive protection of the wounded and sick in non-international armed conflicts.

767 In non-international armed conflicts, the indirect effects of armed conflict on public health can 'constitute a far greater health threat to the people affected than violent injury'.[694] Armed conflict can impede access to health-care facilities and medicines, whether for acute or chronic conditions; it can also favour the spread of infectious disease, contribute to malnutrition, hamper the effective implementation of preventive medicine, such as vaccination campaigns, and disrupt maternal and paediatric care.[695]

768 Collecting and caring for the wounded and sick necessarily implies respecting and protecting them. This also follows from the general obligation in subparagraph (1) to treat them humanely, with the explicit prohibition of certain acts. Therefore, an obligation to respect and protect the wounded and sick has been recognized *de facto* since the adoption of the 1949 Geneva Conventions.[696] Moreover, the obligations to collect and to care also necessarily imply respecting and protecting medical personnel, facilities and transports.[697] This is because the respect and protection of medical personnel, facilities and transports is essential for the effective fulfilment of the obligations to collect and to care for the wounded and sick.

769 Additional Protocol II contains more detailed provisions related to the wounded and sick, notably explicit protections for medical personnel, facilities and transports.[698] The protections set down therein are considered implicit in the basic obligations to collect and to care for the wounded and sick: as they are essential to the implementation of those obligations, they are inseparable from them.[699] Nevertheless, it was thought useful to spell them out in Protocol II. These rules are also generally considered to be part of customary international

[694] Müller, p. 213.
[695] *Ibid.*; ICRC, *Health Care in Danger: A Sixteen Country Study*, ICRC, Geneva, 2011, p. 3.
[696] Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 57.
[697] *Report of the Conference of Government Experts of 1971*, Vol. VII, pp. 30–31.
[698] See Additional Protocol II, Articles 7–12.
[699] The preparatory work for Additional Protocol II shows that the protection of medical personnel, facilities and transports was already considered implicit in common Article 3. See *Report of the Conference of Government Experts of 1971*, Vol. V, pp. 53–55. See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4634.

law.[700] The Conventions contain similar obligations for international armed conflicts.[701]

2. *Historical background*

770 The obligations to collect and to care for the wounded and sick have been part of the legal regime protecting the wounded and sick since its inception in 1864. This is only logical given that Henry Dunant's proposal for an international convention to ameliorate the condition of wounded and sick soldiers was inspired by the appalling conditions he witnessed on the battlefield of Solferino, where some 40,000 fallen Austrian, French and Italian soldiers lay unattended.[702] The provision was expanded upon in the 1906, 1929 and 1949 Geneva Conventions.[703] However, the basic principles that the wounded, sick and shipwrecked may not be attacked and must not be left to suffer without medical care have remained constant since their inception.

771 In 1949, the obligations to collect and to care for the wounded and sick were extended to civilians by the Fourth Convention, as well as to non-international armed conflicts by common Article 3.

3. *Discussion*

a. *Addressees of the obligations*

772 The obligations to collect and to care for the wounded and sick apply to each Party to the conflict, whether State or non-State. This follows also from common Article 3(1), which reads that 'each Party to the conflict shall be bound to apply'. It is worth noting that the codes of conduct of a number of armed groups reflect their understanding that they are bound by the obligations to respect and to protect, as well as to collect and to care for the wounded and sick.[704] Moreover,

[700] See ICRC Study on Customary International Humanitarian Law (2005), Rules 25, 26, 28, 29, 30, 59, 109, 110 and 111.

[701] See First Convention, Articles 12 and 15; Second Convention, Articles 12 and 18; and Fourth Convention, Article 16.

[702] Dunant, p. 126.

[703] Geneva Convention (1864), Article 6; Geneva Convention (1906), Articles 1 and 3; Geneva Convention on the Wounded and Sick (1929), Article 3. In 1899, the principles of the 1864 Geneva Convention were adapted to maritime warfare and to wounded, sick and shipwrecked soldiers at sea by virtue of the Hague Convention (III). In 1907, the Hague Convention (X) superseded the Hague Convention (III) (see Article 25). For more details about the historical background, see the commentaries on Article 12 of the First and Second Conventions, section B.

[704] See e.g. Ejército de Liberación Nacional (ELN), Colombia, Our Principles on Military Doctrine, 1996, Principle 2 ('[The ELN] will give humanitarian treatment to enemies who have surrendered or been wounded in combat and will respect their dignity and provide them with the aid necessary for their condition.'); Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces, Philippines, General Order No. 2 (An order amending Articles 34 and 36 of the code of conduct of the Bangsamoro Islamic Armed Forces and for other purposes), 2006, Article 34(4) ('Wounded enemy combatants – Never betray or be treacherous or vindictive.

most military manuals make no distinction in regard to the protection of the wounded and sick based on the nature of a conflict.[705]

b. Scope of application

i. Categories of persons covered

773 This subparagraph applies to the wounded and sick, whether members of armed forces or civilians. The obligations to collect and to care for are owed equally to the wounded and sick of a Party's own armed forces as to those of the enemy armed forces, as well as to wounded and sick civilians. As a minimum, persons who are wounded or sick as a result of the armed conflict, for example owing to military operations or explosive remnants of war, as well as persons whose medical condition or access to treatment is affected by the conflict, must be considered as falling within the scope of protection of the wounded and sick in common Article 3. A person's medical condition or access to treatment may be said to be affected by the conflict when, for example, a medical facility on which their treatment depends has been destroyed, when they do not have access to medical personnel or facilities on which they depend owing to the conflict, or where they do not have access to medicines vital for their ongoing treatment for reasons related to the conflict.

ii. The wounded and sick

774 The Geneva Conventions in general and common Article 3 in particular do not specify when a person is legally considered to be 'wounded' or 'sick'. Starting from the ordinary meaning of the words, a person would normally be considered wounded or sick if that person is suffering from either a wound or a sickness. The wording is sufficiently open to accommodate a wide range of more or less severe medical conditions, be they physical or mental. It is widely accepted, and also reflected in the definition contained in Article 8(a) of Additional Protocol I, that in order to qualify as wounded or sick for the purposes of humanitarian law, a person must cumulatively fulfil two criteria:

Do not mutilate. . . . (Al-Hadith)) and (6) ('Prisoners of war or captives – Be kind at all times to captives or prisoners of war. Collect and care for wounded combatants. (Al Insan: 5:9)'); Transitional National Council (TNC) Libya, Guidelines on the Law of Armed Conflict, 2011, p. 3, Rules on the treatment of detainees ('Give immediate medical treatment/first aid to anyone who needs it. There is a duty to search for, collect, and aid the injured and wounded from the battlefield of both sides. The dead must also be collected, treated with respect, and buried'); and Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP), Colombia, Beligerancia, Suplemento, 2000, p. 13 ('Las FARC-EP tienen como norma de obligado cumplimiento respetar la vida, suministrar auxilio médico, alimentación y un trato humanitario y digno a los prisioneros de guerra vencidos en combate.' ('FARC-EP abides by rules which oblige it to respect the lives of prisoners of war defeated in combat, to provide them with food and medical care and to treat them humanely and with dignity.')); http://theirwords.org/.

[705] See ICRC, Customary International Humanitarian Law, practice relating to Rules 109 and 110, https://www.icrc.org/customary-ihl/eng/docs/v2_rul.

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first, the person must be in need of medical assistance or care; and second, the person must refrain from any act of hostility.[706]

775 The definition contained in Article 8(a) of Additional Protocol I reflects a contemporary understanding of the terms 'wounded' and 'sick', which provides a useful touchstone for understanding the scope of the obligations in common Article 3. It would be illogical to apply one definition of 'wounded' or 'sick' in international armed conflicts and another in non-international armed conflicts; therefore, it seems appropriate to use the definition in Article 8(a) of Additional Protocol I for the purposes of common Article 3.[707] Moreover, similar definitions to those in Article 8(a) and (b) of Additional Protocol I had been foreseen for inclusion also in Additional Protocol II.[708] The decision ultimately not to include them in the final text of Protocol II was prompted by the desire to shorten the text more generally. However, the definitions as such and their applicability in non-international armed conflicts were not disputed.[709]

776 The status of being wounded or sick is thus based both on a person's medical condition and on their conduct. The humanitarian law definitions of 'wounded' and 'sick' are both broader and narrower than the ordinary meaning of these words.[710] They are broader because they encompass a range of medical conditions in addition to the injuries or disease that would not render a person wounded or sick in the colloquial sense of these terms. At the same time, they are narrower because abstention from any act of hostility is part of the humanitarian law requirement for being wounded or sick.

777 It is useful to recall that for legal purposes (as opposed to medical purposes and the determination of the appropriate medical treatment), it makes no difference whether a person is 'wounded' or 'sick' in the colloquial sense of the words; these terms also cover all other persons in need of immediate medical treatment.

778 For legal purposes, the decisive criterion, in addition to refraining from any act of hostility, is whether a person is in need of medical assistance or care. It is this particular need, and the specific vulnerability that comes with it, to which the legal regime protecting the wounded and sick aims to respond. Indeed, such a reading is also in line with the wording of the first sentence of Article 8(a) of Additional Protocol I, which does not specify any degree of severity of wounds or sickness, but rather refers to persons 'in need of medical assistance or care',

[706] Kleffner, 2013a, pp. 324–325.
[707] See also Bothe/Partsch/Solf, pp. 655–656, and Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4631.
[708] *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. IV, p. 40, Article 11(a). Article 3 of the Second Convention also mentions shipwrecked persons as needing to be collected and cared for.
[709] *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. IV, pp. 39–43, and Vol. XII, pp. 259–272. See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4631, and Sivakumaran, 2012, p. 190.
[710] Sivakumaran, 2012, p. 274.

and by way of example enumerates a range of conditions. Therefore, as far as the relevant medical condition is concerned, the terms 'wounded' and 'sick' are to be interpreted broadly to apply to anyone who is in need of medical assistance or care without any qualitative requirements as to the severity of the medical condition. Nor is a distinction made between an acute illness and a chronic illness; the only relevant factor is the need for medical assistance or care.[711] It follows that victims of sexual violence or other crimes may also fall within the definition of 'wounded and sick', as persons who may need medical care. Mental or psychological conditions, including post-traumatic stress disorder, also qualify, provided they require medical assistance or care.

779 The second sentence of Article 8(a) of Additional Protocol I also makes it clear that 'wounded and sick' covers 'maternity cases, new-born babies and *other persons . . . such as* the infirm or expectant mothers' (emphasis added), as they may be in immediate need of medical assistance or care. All of these cases are merely examples; the decisive criterion is always whether a person is in need of medical assistance or care.

780 It is also irrelevant whether the need for care arises from a medical condition that predates the conflict or is linked to, even if not caused by, the conflict.[712] The definition is 'not restricted to those conflict-affected individuals who are wounded or sick for reasons related to the armed conflict, but covers all persons in need of immediate medical treatment'.[713]

781 In addition to the required medical condition, a person must also refrain from any act of hostility in order to qualify as 'wounded' or 'sick' in the legal sense. Thus, contrary to the colloquial understanding of the terms, a person who continues to engage in hostilities does not qualify as wounded or sick in the legal sense, no matter how severe the person's medical condition may be. For most civilians, this requirement will usually be met. This condition for qualifying as wounded or sick is therefore particularly relevant for fighters,[714] even if it is a general criterion.

782 Fighters who are wounded or sick but who continue to carry out normal roles in their armed forces may be considered to engage in hostile acts. Thus, for

[711] Article 8(a) of Additional Protocol I refers to a need for medical care based on any 'physical or mental disorder or disability'. The fact that a person is 'wounded or sick' under common Article 3 is without prejudice to the fact that the person may simultaneously qualify as a person with a disability under the 2006 Convention on the Rights of Persons with Disabilities, where that Convention applies.

[712] During armed conflicts, many deaths are caused by preventable and treatable illnesses that go untreated for reasons related to the conflict. This was the case in the Democratic Republic of the Congo, for example; see UN Economic and Social Council, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Civil and Political Rights, Concluding observations: DRC*, UN Doc. E/C.12/COD/CO/4, 16 December 2009, para. 34.

[713] Müller, p. 205. See also para. 773 of this commentary.

[714] In this commentary, the term 'fighter' refers to members of the armed forces of non-State armed groups as well as to combatant members of State armed forces.

example, a fighter who has a minor medical condition or who is recovering from a battle wound, but who nevertheless continues to drive an ammunition truck or clean weapons, does not enjoy the protection accorded to the wounded and sick. Nonetheless, that person should receive any necessary medical care from their own armed forces. If, however, a fighter is being treated in a first-aid clinic or hospital for, say, pneumonia or wounds requiring medical care or supervision, and is not engaging in any hostile act, they may not be attacked and must be protected. In practice, attacking Parties may primarily be able to distinguish such wounded or sick fighters from their able-bodied comrades by the fact that they are receiving treatment in a medical facility. Such persons are entitled to the medical care required by their condition. This may be harder to determine during close combat, but factors such as being located in what appears to be a casualty collection point, not carrying arms, or being incapable of movement without the aid of other comrades all suggest the fighter is no longer engaging in any hostile act.

783 During hostilities, when a fighter is wounded in battle, there may be a moment when an attacker must cease the attack on that person and begin to respect and protect them. Under combat conditions, in the very moment that a fighter is injured, it may be extremely difficult to determine with any degree of certainty whether that person is wounded or sick in the legal sense, and in particular whether they are refraining from any hostile acts. In the context of ongoing hostilities, a fighter's condition may change within seconds from being a lawful target to a wounded person – and therefore a protected person. In such situations, considering the short timeframe in which the initial assessment has to be made, the focus may primarily be on whether there are visible signs that a person has been wounded and thereafter refrains from any act of hostility.

784 The relevant criterion is whether a reasonable fighter under the given circumstances would consider the person in question to abstain from hostile acts. For example, a fighter who was engaged in combat and who has just suffered a bullet wound to the lower leg may still be holding a gun. Even on the basis of a relatively light wound such as this, the fighter may cease all acts of hostility. The attacking force must be alert to a possible renunciation of hostilities by an injured fighter and adapt its attack accordingly. In such situations, the authority to continue to engage the fighter is contingent on a good faith assessment of whether the person is wounded and refrains from any act of hostility. The visible absence of all hostile acts on the part of a wounded or sick fighter should put an end to all acts of hostility against that person. In some cases, however, it may be difficult to determine on the battlefield whether a wounded person is refraining from any hostile act.

785 A person who continues to fight, even if they are severely wounded, will not qualify as wounded in the legal sense. There is no obligation to abstain from attacking a person who is wounded or sick in the colloquial sense and who continues to engage in hostilities. Parties to the conflict may provide guidance to their armed

forces to help them assess such situations by issuing an internal document such as 'rules of engagement', which must comply with humanitarian law.

iii. Conclusion

786 As stated above, the wounded and sick must be respected and protected. This notion is at the heart of common Article 3 and reinforced by the express terms of Article 7 of Additional Protocol II.[715] In this context, the obligation to respect the wounded and sick entails, as a minimum, that they be spared from attack and must not be murdered or ill-treated. In addition, they must be protected, meaning that all Parties have an obligation to come to their defence to try to stop or prevent harm to them, be it from third parties, from the effects of ongoing hostilities or from other sources. For example, the obligation to protect may entail that measures be taken to facilitate the work of medical personnel, including steps to facilitate the passage of medical supplies.[716]

c. The obligation to collect the wounded and sick

787 Parties to the conflict are obliged to collect the wounded and sick. Consistent with the humanitarian objectives of common Article 3 and humanitarian law more generally, the word 'collect' must be interpreted broadly and includes an obligation to search for the wounded and sick and to evacuate them to a more secure location.[717] Should this not be done, many would be left behind in the area of hostilities, contrary to the object and purpose of this subparagraph. The aim of the provision is to remove the wounded and sick from the immediate danger zone and to enable them to receive the necessary medical treatment as rapidly as possible and under better and more secure conditions. Searching for and collecting the wounded and sick would be meaningless if there were no corresponding obligation to evacuate them to a more secure location. Under customary international law, the obligation of evacuation exists alongside the obligations of search and collection.[718]

788 The obligation to collect the wounded and sick, as well as the obligations to search for and to evacuate them, are obligations of conduct. As such, they are to be exercised with due diligence. Due diligence is a relative standard, and the precise content of what is required depends on the circumstances.[719] Thus, in

[715] *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XI, pp. 209–210.
[716] ICRC, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups*, ICRC, Geneva, 2015, p. 23.
[717] Similar obligations exist for international armed conflicts in Article 15 of the First Convention and Article 16 of the Fourth Convention.
[718] ICRC Study on Customary International Humanitarian Law (2005), Rule 109.
[719] Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', *German Yearbook of International Law*, Vol. 35, 1992, pp. 9–51, at 44; Timo Koivurova, 'Due Diligence', version of February 2010, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2011, http://www.mpepil.com.

each case it needs to be determined when it is reasonable to commence search, collection and evacuation activities and with what means and measures.

789 The obligation to collect the wounded and sick is a continuous obligation, i.e. it applies for the duration of the non-international armed conflict. Article 8 of Additional Protocol II requires Parties to take all possible measures to search for, collect and protect the wounded, sick and shipwrecked 'whenever circumstances permit'. The same requirement exists under customary international law.[720] Whenever there is an indication that wounded and sick persons may be in the area, and provided that circumstances permit, search, collection and evacuation activities must begin. It is evident that, particularly after an engagement, there is a high likelihood that wounded and sick persons will be present. Although 'particularly after an engagement' is not mentioned in common Article 3, it is mentioned in Article 8 of Additional Protocol II.[721] It can be inferred that unless there are clear indications to the contrary, a good faith application of common Article 3 requires search, collection and evacuation activities without delay after every engagement.

790 Common Article 3 does not require that search, collection and evacuation activities put lives at risk. Inadequate security conditions may, for example, prevent such activities taking place for a time.[722] Thus, the obligation does not require that search, collection and evacuation activities necessarily take place during an ongoing engagement. Nevertheless, there may be exceptions. For example, if during an engagement on the ground it becomes apparent that there are wounded persons in the area and a Party to the conflict has the possibility to collect and evacuate them by air, or by any other means, without great risk to its personnel, a good faith application of the rule would require it to do so. Similarly, if significant resources in terms of personnel and equipment are available, their deployment is required according to what is reasonable. Conversely, if resources are scarce, the Convention does not require Parties to do the impossible, but they must do what is feasible under the given circumstances, taking into account all available resources.

791 Given that quick medical treatment is often life-saving, it is crucial that the wounded and sick are searched for and collected as soon as possible.[723] Hence, it is inherent in the obligation that search and rescue activities must begin as

[720] ICRC Study on Customary International Humanitarian Law (2005), Rule 109. See also Mali, *Army Service Regulations*, 1979, Article 36; Morocco, *Disciplinary Regulations*, 1974, Article 25(4); and Netherlands, *Military Handbook*, 2003, p. 7-44.

[721] Article 15 of the First Convention also requires Parties to the conflict, '[a]t all times, and particularly after an engagement', to 'take all possible measures to search for and collect the wounded and sick', 'without delay'. The obligation in Article 18 of the Second Convention to 'without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick' applies '[a]fter each engagement'.

[722] In this regard, for example, Canada's *Code of Conduct*, 2002, p. 2-12, para. 3, states that '[i]t is understood however that this obligation only comes into play once the area has been secured'.

[723] Atul Gawande, 'Casualties of War – Military Care for the Wounded from Iraq and Afghanistan', *The New England Journal of Medicine*, Vol. 351, 2004, pp. 2471–2475.

soon as circumstances permit, without delay. Parties are strongly encouraged to conclude special agreements allowing for a pause in fighting in order to carry out such activities.[724]

792 Although it is clear that Parties to a non-international armed conflict are responsible for searching for and collecting the wounded and sick, common Article 3 does not specify who it is that has actually to carry out these activities. The typical scenario envisaged in the article involves search, collection and evacuation activities by the Party or Parties to the conflict that have been involved in the engagement that has resulted in wounded persons. In a multi-Party conflict, however, it may also mean that a Party that was not involved in a particular engagement needs to assist in the search for and collection of the wounded and sick.

793 If the resources of a Party to the conflict are not sufficient to carry out search, collection and evacuation activities in order to meet its obligations under common Article 3, that Party may call upon civilians or humanitarian organizations to assist in these efforts.[725] Similarly, when the medical needs of the wounded and sick go beyond what a Party to the conflict is able to provide, that Party should seek to evacuate them to a place where more extensive medical facilities are available. If a Party is not able to search for, collect or evacuate the wounded and sick itself, it needs to provide all the relevant information to enable others to carry out these tasks safely. Parties should thus facilitate the safe and efficient passage of medical collection and evacuation transports and personnel and any other necessary equipment, and provide transport routes and times that do not subject the personnel or transports to the risk of mined areas or other obstacles. For example, Parties should take measures to protect humanitarian workers from the effects of mines and other explosive remnants of war. Specific treaty obligations exist under the Protocols to the Convention on Certain Conventional Weapons.[726]

794 The obligations to collect and to care for the wounded and sick entail a corollary obligation on opposing Parties to permit evacuations and transport to medical facilities to take place as rapidly as possible. To implement these obligations, for example, procedures at checkpoints are required to allow for the quickest possible collection, evacuation and care of the wounded and sick and to avoid the unnecessary delay of medical transports. Security checks would have to be carried out as quickly as possible. Even short delays, such

[724] For more details, see section K.

[725] Henckaerts/Doswald-Beck, commentary on Rule 109, p. 398. see also First Convention, Article 18, and Second Convention, Article 21.

[726] For States party to the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons, each Party to the conflict must respect the relevant obligations in Article 12 of that Protocol (see in particular Article 12(2)–(5)), and for States party to the 2003 Protocol V to the Convention on Certain Conventional Weapons, each Party to the conflict must respect the relevant obligations in Article 6 of that Protocol.

as those lasting less than an hour, can be fatal.[727] When a Party deems it necessary to arrest or detain a wounded or sick person who is being transported to a medical facility, it must balance any security measures against the patient's medical condition. In any case, such security measures may not impede access to necessary and adequate medical care and a Party that proceeds to an arrest must ensure the continuous medical treatment of the person arrested and detained. Likewise, if a person transporting the wounded and sick or providing aid is arrested or detained, the transport of the wounded or sick persons to medical facilities or the provision of the necessary care during transport would nevertheless have to be ensured.

795 In a similar vein, Parties transporting the wounded and sick of the adversary to medical facilities are required to do so as quickly as possible, and in any case may not intentionally prolong the journey for any purposes that are not warranted by the medical condition of the wounded or sick persons during transit.

796 If a Party is unable or unwilling to evacuate the wounded or sick, authorization for impartial humanitarian organizations to do so should be liberally granted and must in no circumstance be withheld arbitrarily.[728] Practice shows that the ICRC in particular has frequently engaged in the evacuation of the wounded and sick.[729]

797 Although common Article 3 does not mention an obligation to collect the dead, Article 8 of Additional Protocol II includes obligations to search for the dead, to prevent their being despoiled and to dispose of them decently. Similar obligations exist under customary international law.[730] Under customary international law, Parties to the conflict must also take all feasible steps to identify deceased persons and, whenever possible, return the bodies to the families for proper burial, cremation or funeral rites.[731] This can only be done if the dead are searched for and collected. In practice, the dead may be searched for and collected at the same time as the wounded and sick, although different procedures may need to be followed.[732] That said, priority must be given to the wounded and sick so that they receive proper and timely treatment.

[727] ICRC, *Health Care in Danger: Violent Incidents Affecting the Delivery of Health Care*, p. 8.
[728] For more details, see section J.
[729] For example, during the clashes in Budapest in 1956 (*International Review of the Red Cross*, Vol. 38, No. 456, December 1956, p. 720); during the civil war in the Dominican Republic in 1961 (*International Review of the Red Cross*, Vol. 47, No. 558, June 1965, p. 283); during the civil war in Lebanon in 1976 and 1981 (*International Review of the Red Cross*, Vol. 58, No. 692, August 1976, pp. 477–478, and ICRC, *Annual Report 1981*, ICRC, Geneva, pp. 52–53); and during the civil war in Chad in 1979 (*International Review of the Red Cross*, Vol. 61, No. 716, April 1979, pp. 95–96). See also ICRC, Communication to the Press No. 96/25, Russian Federation/Chechnya: ICRC calls on all parties to observe truce, 10 August 1996.
[730] ICRC Study on Customary International Humanitarian Law (2005), Rules 112–116.
[731] *Ibid.* Rules 114, 115, 116 and supporting practice, https://www.icrc.org/customary-ihl/eng/docs/v2_rul.
[732] For example, ambulances should not be used to collect the dead. See also ICRC, *Management of Dead Bodies after Disasters*, pp. 7–8. Searching for and recording the dead also helps to prevent the deceased from becoming missing.

d. The obligation to care for the wounded and sick

798 The obligation to care for the wounded and sick requires that the Parties to the conflict take active steps to ameliorate their medical condition. Like the other obligations in common Article 3, this obligation applies equally to State and non-State Parties. Some non-State armed groups have the capacity to provide sophisticated medical care, while others have more rudimentary capacities. In any case, non-State armed groups must endeavour to develop their capacities to provide treatment to the best of their abilities and should be permitted to do so. Like State Parties, they should ensure that their forces are trained in first aid. Likewise, they may have recourse, if necessary, to medical aid provided by impartial humanitarian organizations.

799 The obligation to care for the wounded and sick is an obligation of means. Its exact content depends on the specific circumstances of each case.[733] Evidently, a person who is severely wounded will require greater medical care than a person with minor injuries;[734] a Party that has significant medical supplies at its disposal will be required to do more than a Party that only has limited means;[735] and if medical doctors are present, higher standards of medical care can be expected than in circumstances where there are only fighters with more limited training.[736] Notably, the corresponding provision in Additional Protocol II and customary law require medical care to be provided 'to the fullest extent practicable and with the least possible delay'.[737] In terms of substance, the same kind and quality of medical care is owed under the Geneva Conventions, Additional Protocol II and customary international law.

800 First aid is essential and often life-saving. Nevertheless, given that it may have to be administered on the battlefield after or possibly even during an engagement, it is clear that common Article 3 does not require the same standard of treatment as that required under more secure conditions once the wounded and sick have been transferred to a medical unit. While medical care in accordance with the highest medical standards is the most desirable, common Article 3 requires only what can reasonably be expected under the given circumstances, taking into consideration factors such as the security conditions and the available resources.

801 With respect to the kind and quality of medical care that is owed by virtue of common Article 3, the basic rule is that the wounded and sick must receive the

[733] ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 430.
[734] Even in the case of fatal wounds, due diligence requires they be treated, notably to address pain and distress; see United States, *Law of War Deskbook*, 2010, p. 51.
[735] See e.g. Lindsey, p. 112: 'Especially in armed conflicts, the necessary resources for providing safe blood donations may be limited.'
[736] Eritrea-Ethiopia Claims Commission, *Prisoners of War, Ethiopia's claim*, Partial Award, 2003, paras 57 and 69–70.
[737] Additional Protocol II, Article 7(2), and ICRC Study on Customary International Humanitarian Law (2005), Rule 110.

medical care required by their condition. Albeit not explicitly mentioned in this article, this is generally accepted and explicitly provided for in Additional Protocol II and corresponds to customary law.[738] General guidance regarding the applicable standards of professional medical conduct may be derived from universally applicable, general stipulations and instruments adopted by the World Medical Association (WMA).[739] These standards may change over time and there may be differences from country to country. However, as far as the standard of medical care is concerned, the obligation requires the kind of treatment that would be administered by a medical practitioner under the given circumstances and in view of the person's medical condition.[740]

802 In all cases, care must be provided in accordance with medical ethics.[741] This requires that care be dictated exclusively by the principles of triage.[742] Thus, it would be a violation of the obligation to care for the wounded and sick for any Party to insist, for example, that lightly wounded fighters be given priority over civilians or others in urgent need of medical care. Indeed, no grounds for discrimination in treatment are permitted other than medical ones.[743]

803 Women, men, boys and girls of different ages and backgrounds can have different medical needs, be exposed to different risks hindering equal care, or face different social stigma connected to being wounded or sick. It is thus important to include the perspectives of women and men from different ages and backgrounds in needs assessments relating to medical care, taking into account possible limitations such as physical access, security, financial constraints and socio-cultural constraints, as well as possible solutions.[744]

[738] *Ibid.*

[739] Instruments concerning medical ethics in times of armed conflict, especially: the World Medical Association's Regulations in Times of Armed Conflict (adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956, as amended or revised in 1957, 1983, 2004, 2006 and 2012); Rules Governing the Care of Sick and Wounded, Particularly in Time of Conflict (adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956, edited and amended in 1957 and 1983); Standards of Professional Conduct regarding the Hippocratic Oath and its modern version, the Declaration of Geneva, and its supplementary International Code of Medical Ethics (adopted by the 3rd WMA General Assembly, London, England, October 1949, as amended in 1968, 1983 and 2006). See also ICRC, *Health Care in Danger: The Responsibilities of Health-Care Personnel Working in Armed Conflicts and Other Emergencies*, ICRC, Geneva, 2012, pp. 55–62.

[740] There are many studies on the type of equipment and techniques that medical practitioners should use and on the procedures they should follow; see e.g. ICRC, *War Surgery*.

[741] Bothe/Partsch/Solf, p. 108, para. 2.3. See also the explicit reference to medical ethics in Article 16(1)–(2) of Additional Protocol I.

[742] For the principles of triage, see ICRC, *First Aid in Armed Conflicts and Other Situations of Violence*, p. 116.

[743] See Additional Protocol II, Article 7(2), and ICRC Study on Customary International Humanitarian Law (2005), Rule 110.

[744] See Charlotte Lindsey-Curtet, Florence Tercier Holst-Roness and Letitia Anderson, *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*, ICRC, Geneva, 2004, p. 76. When planning for and providing care, therefore, it is essential to be sensitive to how social, cultural, economic and political structures create roles or patterns that, in turn, may carry a specific status as well as generate needs and capacities that differ among men and women. Understanding the impact of gender and other diversities on the

804 Lastly, medical care in the strict sense, i.e. exclusively medical treatment of a wound or disease in and of itself, is not sufficient to ameliorate the condition of a wounded or sick person. Indeed, it may not be sufficient to provide medical care if adequate food, clothing, shelter and hygiene were not provided alongside. This is especially the case when severely wounded persons are being treated over a longer period of time. In light of its object and purpose, the obligation to care for the wounded and sick in common Article 3 should be interpreted broadly, to pertain not only to medical care but also, at a minimum, to the provision of food, clothing, shelter and hygiene, which help to ameliorate the condition of the wounded and sick. In any event, depriving the wounded and sick of such essentials would also in most circumstances amount to inhuman treatment in violation of the general obligation imposed by common Article 3.[745] Caring for the sick may also entail taking preventive measures to ensure the basic health of the population, including vaccinating people against infectious diseases.

e. Obligations implicit in collecting and caring for the wounded and sick

805 In order to protect the wounded and sick, those searching, collecting and caring for them, as well as their transports and equipment, also need to be protected. It is thus implicit in common Article 3 that medical personnel must be respected and protected, as it is understood that 'the protection of medical personnel is a subsidiary form of protection granted to ensure that the wounded and sick receive medical care'.[746] This protection is recognized as a part of customary international law governing non-international armed conflicts and is codified in Article 9 of Additional Protocol II.[747] It also results from subparagraph (1) of common Article 3 as medical personnel who do not participate directly in hostilities are protected under this provision. The act of administering health care to a member of a non-State armed group may not be interpreted as supporting the group's cause, nor may it be construed as engaging in a hostile act. Thus, medical personnel may not be punished for the mere fact of providing treatment or care for wounded and sick persons in accordance with medical ethics.[748] Harassing or punishing medical personnel for such acts would

opportunities people have and their interactions with others will contribute to more effective protection and respect in caring for the wounded and sick.

745 For more details, see section F.1.

746 *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XI, pp. 209–210. See also the commentary on Article 24 of the First Convention, para. 1948; the commentary on Article 36 of the Second Convention, para. 2441; and Henckaerts/Doswald-Beck, commentary on Rule 25, p. 80.

747 For the definition that was proposed during the Diplomatic Conference, see *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XIII, p. 304. See also Henckaerts/Doswald-Beck, commentary on Rule 25, pp. 81–83, affirmed by Breau, pp. 177–178.

748 See also Additional Protocol II, Article 10(1), and ICRC Study on Customary International Humanitarian Law (2005), Rule 26.

constitute a violation of the obligation to care for the wounded and sick as it impedes the provision of care.

806 Likewise, medical units and transports may not be attacked, including when they are being used to transport wounded fighters.[749] If they are used to commit acts of hostility, such as transporting weapons or able-bodied fighters, they lose their protection from attack. Thus, Parties to the conflict must take all feasible precautions to protect medical units, facilities and transports from the dangers arising from military operations. This would include avoiding using them in ways that may lead to their loss of protection against attack in order to ensure that they can continue to collect and care for the wounded and sick. If such units have lost their protection against attack, Parties to the conflict must give a warning and may proceed with an attack only if that warning has gone unheeded after a reasonable time limit, as recognized by Article 11(2) of Additional Protocol II.[750] What constitutes a reasonable time limit will vary according to the circumstances; however, it must be long enough either to allow the unlawful acts to be stopped or for the wounded and sick, as well as medical personnel, who are present within the unit, to be removed to a safe place. The warning also allows the medical facility to reply to an unfounded accusation. However, the setting of a time limit may be entirely dispensed with if the misuse places the attacking forces in immediate danger to their lives, in which case they may respond in self-defence. This may occur, for example, when a medical transport is approaching a checkpoint while firing on those guarding the checkpoint.[751]

807 These implicit obligations also mean, for instance, that medical facilities or transports needed or used for providing medical care must not be pillaged or destroyed. The pillaging of medical facilities impedes the provision of care for wounded and sick persons, and thus would violate this subparagraph. This is the case even when pillaging of such facilities is driven by a need for medical supplies by a Party to the conflict. Parties may therefore need to take measures to ensure that medical facilities and transports are not looted or pillaged by others.

[749] The ICC lists as war crimes in non-international armed conflicts the intentional attack against 'buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law' and against 'hospitals and places where the sick and wounded are collected, provided they are not military objectives'; see ICC Statute (1998), Article 8(2)(e)(ii) and (iv). See also Dörmann, 2003, p. 462. It may be noted that the Commission of Inquiry on Syria found that '[a]ttacks on medical personnel and facilities violate common article 3 of the Geneva Conventions and customary international humanitarian law and amount to war crimes'; see Human Rights Council, *Commission of Inquiry Report on Syria*, 13 August 2014, UN Doc. A/HRC/27/60, para. 111.

[750] See also ICRC Study on Customary International Humanitarian Law (2005), Rules 28 and 29 and commentary (Henckaerts/Doswald-Beck, pp. 91–102); San Remo Manual on the Law of Non-International Armed Conflict (2006), section 4.2.1; United States, *Law of War Manual*, 2016, pp. 1061–1062, para. 17.15.2; Breau, pp. 177–178; and Kleffner, 2013a, p. 338.

[751] Kleffner, 2013a, p. 338.

808 In addition, armed entry into medical facilities in order to carry out search operations can severely disrupt the provision of medical care. Military search operations in medical facilities must therefore be an exceptional measure and should be carried out in a manner that minimizes any negative impact on the provision of care. If a person is arrested, continuing care must be ensured. To avoid loss of protection from attack on medical facilities or transports, Parties must not take actions that lead to such a loss. Actions that lead to loss of protection include, for example, storing weapons in hospitals (with the exception of weapons belonging to the wounded and sick being treated in the hospital held temporarily during their care) or using ambulances for the transport of able-bodied forces, weapons or ammunition.

809 Furthermore, it is helpful if those caring for the wounded and sick and their facilities are identifiable so that they will not be attacked. Marking medical facilities, under proper authorization and control, such as with a red cross, red crescent, or red crystal emblem can make it easier for the opposing Party and the public to identify such facilities and enhance access to medical care.

810 Common Article 3 is silent with respect to the use of the distinctive emblems in non-international armed conflicts. However, Article 12 of Additional Protocol II sets down the conditions for lawful use of the emblems for protective purposes in non-international armed conflicts:

> Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

811 During the negotiations leading to the adoption of Article 12, there was no objection to the notion that the medical personnel of non-State armed groups may display the emblem on the same footing as that permitted for States.[752] This means that the leadership of the group must be in a position to authorize and control the use of the emblem. The improper use of the distinctive emblems of the Geneva Conventions is prohibited under customary international law.[753] Improper use means any use of the emblems for a purpose other than those for which they were intended.[754] Moreover, the protective emblem must be in its pure form. That is, it must contain only the red cross, red crescent or red crystal on a white background, devoid of any additional markings or wording.[755]

[752] *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XI, pp. 427–431.
[753] ICRC Study on Customary International Humanitarian Law (2005), Rule 59.
[754] Henckaerts/Doswald-Beck, commentary on Rule 59, p. 209.
[755] In practice, for protective purposes the ICRC uses its 'roundel' (a red cross enclosed in two concentric circles between which are written the words 'COMITE INTERNATIONAL GENEVE'), and this is widely accepted. This practice applies only to the ICRC, however.

812 Practice known to the ICRC shows that the medical personnel of some non-State armed groups do wear an armband with a red cross or red crescent emblem, while many others do not. Parties may also wish to make the presence of medical facilities known by communicating the GPS coordinates of medical facilities to other Parties.

813 Whether or not State armed forces or non-State armed groups choose to display the emblem, it is imperative that they respect its use by their adversaries in order to ensure that the wounded and sick may be collected and cared for. In this light, it must be underscored that, as is the case in international armed conflicts, if medical personnel carry light weapons exclusively for self-defence or for the defence of wounded or sick persons in their care, it does not entail a loss of protection from attack.[756] Thus, the fact that medical personnel are carrying such weapons for such purposes does not excuse the Parties to a conflict from the obligation to respect – and not attack – such medical personnel. That said, in order to maintain their protection, medical personnel may not commit acts harmful to the enemy.[757]

814 In some non-international armed conflicts, an alternative emblem to the red cross or red crescent has been adopted in order to designate personnel and facilities providing health care uniquely to the civilian population. This is the case, for example, for the Misión Médica in Colombia.[758] In any case, even if health facilities or transports are not marked with an emblem or identified by other means indicating protection, as soon as they are known, they must be respected and protected.[759]

815 Lastly, Parties to the conflict may also create zones, using special agreements, as provided for in common Article 3(3), in which the wounded and sick may be cared for.[760] They must be created with the consent of all Parties and must be demilitarized. Such zones have been established in a number of non-international armed conflicts.[761] It is important to recall that, in any case, the wounded and sick and any medical personnel providing treatment in such zones are protected owing to their being wounded or sick or to their role as medical personnel; protection is not contingent on the creation of the zone itself. Moreover, persons outside such zones remain protected according to the general rules of humanitarian law. Thus, even if such zones are not created, the

See ICRC, *Study on the Use of the Emblems: Operational and Commercial and Other Non-operational Issues*, ICRC, Geneva, 2011, pp. 156–157.

[756] See Article 22.

[757] For a discussion of the notion of acts harmful to the enemy committed by medical personnel, see the commentary on Article 24 of the First Convention, section F; see also the commentary on Article 21 of the First Convention, section C.1, in relation to medical units.

[758] See Colombia, Ministry of Health and Social Protection, *Manual de Misión Médica*, Bogotá, 2013, Resolución 4481 de 2012, pp. 11–12.

[759] See also Additional Protocol I, Annex I, Article 1(2).

[760] See also ICRC Study on Customary International Humanitarian Law (2005), Rules 35 and 36.

[761] These include, for example, the conflicts in Cambodia, Chad, Cyprus, Lebanon, Nicaragua and Sri Lanka. See Henckaerts/Doswald-Beck, commentary on Rule 35, p. 120, fn. 6.

wounded and sick and medical personnel and facilities, as well as civilians who are not directly participating in hostilities, must be respected and protected. Directing an attack against such a zone is prohibited.[762]

J. Paragraph 2: Offer of services by an impartial humanitarian body such as the ICRC

1. Introduction

816 Common Article 3(2) grants impartial humanitarian bodies the right to offer their services to the Parties to a non-international armed conflict. The International Committee of the Red Cross (ICRC) is explicitly mentioned as an example of an entity entitled to rely on this provision. This right can be exercised vis-à-vis all Parties to a conflict, including non-State Parties.

817 Other humanitarian law provisions dealing with this subject qualify the way in which this right is to be exercised: in order to undertake the proposed activities, an impartial humanitarian organization needs to have consent. Since 1949, international law has developed to the point where the consent may not be arbitrarily withheld by any of the Parties to a non-international armed conflict (see section J.7.b).

818 Through the adoption of both this paragraph and other related provisions, the High Contracting Parties have recognized that the right to offer services, be it in international or non-international armed conflict, merits a firm footing in international law.[763] This broad legal foundation is unsurprising, and merely reflects the axiom that, irrespective of its legal characterization, every armed conflict generates humanitarian needs. Regardless of the legal qualification of the armed conflict, therefore, States have recognized that, as a matter of international law, the ICRC and other impartial humanitarian bodies will most likely have a role to play in meeting those needs.

819 The willingness and ability of impartial humanitarian bodies to respond to the humanitarian needs of persons affected by a non-international armed conflict do not detract from the fact that, as a matter of international law, the primary responsibility for meeting those needs lies with the Parties to the conflict. The activities of impartial humanitarian bodies should only complement, where necessary, the efforts of that Party in this regard. This is also why impartial humanitarian organizations are under no legal obligation to offer their services, as is clear from the wording 'may offer' in common Article 3(2); they can do so at their discretion.

[762] See ICRC Study on Customary International Humanitarian Law (2005), Rule 35.
[763] Other related provisions are common Article 9 (Article 10 of the Fourth Convention) for international armed conflicts, and Article 18 of Additional Protocol II for non-international armed conflicts.

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820 For their part, National Red Cross and Red Crescent Societies (hereinafter 'National Societies') nevertheless have a duty to consider seriously any request by their own public authorities to carry out humanitarian activities falling within their mandate, provided these activities can be implemented in accordance with the Fundamental Principles of the International Red Cross and Red Crescent Movement (hereinafter 'the Movement'). This duty stems from their special status and unique auxiliary role to their own public authorities in the humanitarian field – a status articulated in the Movement's Statutes.[764] The Fundamental Principles are listed in the preamble to the Statutes, adopted by the International Conference of the Red Cross and Red Crescent, which brings together the States party to the 1949 Geneva Conventions, as well as the components of the Movement, and can therefore be considered authoritative.[765]

821 The right to offer services, which is also sometimes referred to as the 'right of humanitarian initiative', is not to be confused with the so-called 'right of humanitarian intervention' nor with the 'responsibility to protect' (R2P), two distinct concepts which have engendered much debate, for example as to whether international law permits measures such as the threat or the use of force when motivated by humanitarian considerations.[766] Similarly, the analysis of common Article 3(2) remains without prejudice to the UN Security Council's entitlement to act, on the basis of the 1945 UN Charter and in line with the effect of its decisions under international law, as it deems fit with regard to humanitarian activities. These issues are regulated by international law in general and the law on the use of force (*jus ad bellum*) in particular. Thus, they have to be kept separate from the subject of humanitarian activities carried out within the framework of common Article 3(2).

2. *Historical background*

822 Practical examples of humanitarian activities undertaken in the context of a non-international armed conflict predate the adoption of common Article 3.[767] Indeed, prior to 1949 no general treaty provision as such regulated non-international armed conflicts.[768] As a corollary, no treaty law regulated the

[764] Statutes of the International Red Cross and Red Crescent Movement (1986), Article 4(3).

[765] The Fundamental Principles were first proclaimed by the 20th International Conference of the Red Cross in Vienna in 1965. They were then integrated into the preamble to the Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross in 1986 and amended in 1995 and 2006.

[766] Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention', version of May 2011, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, para. 2, http://www.mpepil.com.

[767] For details, see Bugnion, 2003a, pp. 244–296, Chapter IX, The International Committee of the Red Cross and Internal Conflicts (1863–1945).

[768] See also section A.

conditions under which humanitarian activities could be proposed, and implemented, in non-international armed conflicts. Initially, however, the absence of an international legal framework on the matter proved to be no obstacle for both the ICRC (founded in 1863) and National Societies (founded thereafter) to deploy activities in several such conflicts. Over time, however, the need for a treaty-based normative framework to clarify some basic questions became increasingly apparent: notably, were humanitarian organizations entitled, as a matter of treaty law, to offer their services in the context of a non-international armed conflict?

823 With this in mind, the 10th International Conference of the Red Cross in 1921 adopted a resolution on the normative framework applicable to the ICRC and National Societies.[769] Until 1949, this resolution remained the principal instrument governing the right to offer services.[770]

824 No trace of what eventually became common Article 3(2) can be found in the drafting stages leading up to the 1949 Diplomatic Conference. During the Conference, the first Working Party used a different formulation with regard to the right to offer services: the possibility for an impartial humanitarian body, such as the ICRC, to offer its services to a Party to a non-international armed conflict was preconditioned on the absence of an agreement between the Parties on the designation and functioning of Protecting Powers.[771] In the First Draft, the activities of the impartial humanitarian body were thus to be those conferred by the Geneva Conventions on the Protecting Powers.[772] The second Working Party, however, dropped the reference to the absence of Protecting Powers in both of its drafts and instead foresaw the possibility for an impartial humanitarian body, such as the ICRC, to offer its services simply 'to the Parties to the conflict'.[773]

3. *Impartial humanitarian bodies*

a. *General*

825 Only an 'impartial humanitarian body' is entitled to offer its services in the sense of this provision, and with the legal consequences attached thereto. As is

[769] 10th International Conference of the Red Cross, Geneva, 1921, Resolution XIV, Principles and Rules for Red Cross Disaster Relief, Principle I; see Bugnion, 2003a, pp. 260–262. An unsuccessful attempt had already been made to have a resolution adopted on the subject at the 9th International Conference of the Red Cross in Washington in 1912; see Bugnion, 2003a, pp. 248–250.

[770] See Bugnion, 2003a, pp. 263–286. Of note from this period is a draft resolution proposed by the ICRC at the 16th International Conference of the Red Cross in London in 1938. This resolution, which would have provided a more solid legal foundation for the ICRC to act in the case of non-international armed conflict, while solidifying its role in the case of 'civil war', fell short of comprehensively clarifying the legal framework on this topic; see *ibid.* pp. 283–286.

[771] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 122.

[772] *Ibid.* p. 124.

[773] *Ibid.* pp. 125–126.

the case with the substantively identical notion of 'impartial humanitarian organization' used in common Article 9 dealing with the right to offer services in international armed conflict, this concept is not defined in the Geneva Conventions. The equally authentic French version of the Geneva Conventions uses the term 'organisme humanitaire impartial' in both common Article 3(2) and common Article 9, thus reinforcing the conclusion that 'impartial humanitarian body' and 'impartial humanitarian organization' can be considered substantively identical notions.

826 When these words were inserted in the text of common Article 3, the High Contracting Parties primarily had the ICRC and the National Societies in mind as examples they were familiar with. Since 1949, the number and diversity of organizations that consider themselves to be impartial humanitarian organizations in the sense of common Article 3, and which are recognized as such by Parties to an armed conflict, have grown significantly to include both certain non-governmental and intergovernmental organizations.

827 For an organization to qualify as a 'humanitarian organization', there is no requirement that the scope of its activities be limited to humanitarian activities.[774] Thus, an organization that focused solely on development activities prior to the outbreak of the armed conflict may subsequently become, for the purposes of common Article 3, a humanitarian organization, without prejudice to the possibility of the organization concurrently pursuing activities of a different nature elsewhere.

828 Common Article 3 requires that the entity wishing to offer its services be an impartial humanitarian 'body'. Thus, a loose association of individuals, while their activities may alleviate human suffering, would not qualify on the basis of this provision. Nor would a private person wishing to engage in charitable activities. A minimum structure is required for the 'body' to be able to function as a humanitarian organization. In addition, at all times the organization ought to be capable of complying with professional standards for humanitarian activities.[775] Otherwise, in practice there is a risk that the authorities to whom the offer of services is made may doubt the impartial and humanitarian nature of the organization.

829 Humanitarian organizations require financial means in order to sustain their staff and operations and to purchase the necessary goods and services.

[774] For an analysis of which activities qualify as 'humanitarian activities', see section J.5.a.

[775] See e.g. ICRC, *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 3rd edition, ICRC, Geneva, 2018. These standards, adopted through an ICRC-led consultation process, reflect shared thinking and common agreement among humanitarian and human rights agencies (UN agencies, components of the Movement, and non-governmental organizations). The ICRC is of the view that the standards of protection that an agency provides should not fall below those set out in this document.

Therefore, the fact that money is involved can by no means be considered as depriving the organization or its activities of their 'humanitarian' character. Further, provided the organization continues to act as an impartial humanitarian organization, nothing precludes it from maintaining a relationship with an economic actor such as a private or a State-owned company. Examples of such relationships include: when economic actors with the capacities to deliver humanitarian services, such as a commercial aviation company used for the transport of relief goods, sell their services to impartial humanitarian organizations at a profit; or when economic actors provide their services to impartial humanitarian organizations for free, for example as part of a corporate social responsibility programme.

830 While there are a wide variety of instances in which economic actors can be involved in humanitarian activities, even when they provide free services within the framework of a particular humanitarian activity, their otherwise profit-making profile precludes them from qualifying as an impartial humanitarian organization in their own right. Other examples of the involvement of economic actors in humanitarian activities include: receiving payment from another actor (such as the armed forces) for delivering humanitarian services; and delivering humanitarian services directly themselves, i.e. without having a relationship with an impartial humanitarian organization. Thus, economic actors may not invoke the right to offer services in the sense of common Article 3 since they do not qualify as impartial humanitarian organizations.

831 The Geneva Conventions require a humanitarian organization wishing to offer its services on the basis of common Article 3 to be 'impartial'. Impartiality refers to the attitude to be adopted vis-à-vis the persons affected by the armed conflict when planning and implementing the proposed humanitarian activities. As one of the Movement's Fundamental Principles, 'impartiality' is the requirement not to make any 'discrimination as to nationality, race, religious beliefs, class or political opinions' or any other similar criteria.[776] Further, the Fundamental Principle of impartiality, which has been endorsed by the International Court of Justice,[777] requires the components of the Movement to 'endeavou[r] to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress'.[778]

[776] While the words 'any other similar criteria' do not appear in common Article 9, they do in other provisions of the Geneva Conventions. See e.g. Article 12(2) of the First Convention.

[777] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 242.

[778] See also The Humanitarian Charter (1997), para. 6, which states:

> [Humanitarian] assistance must be provided according to the principle of impartiality, which requires that it be provided solely on the basis of need and in proportion to need. This reflects the wider principle of non-discrimination: that no one should be discriminated against on any grounds of status, including age, gender, race, colour, ethnicity, sexual orientation, language, religion, disability, health status, political or other opinion, national or social origin.

As a matter of good practice, this definition is followed not only by the components of the Movement, but also by actors outside the Movement.

832 For an organization to qualify as an 'impartial humanitarian body', it does not suffice for it to claim unilaterally that it qualifies as such: it needs to operate impartially at all times. In operational reality, it matters that the authorities to whom an offer of services is made perceive the organization to be both impartial and humanitarian in nature, and that they trust that the organization will behave accordingly.

833 The principle of impartiality applies at both the planning and the implementation stages of any humanitarian activity: only the needs of the persons affected by the conflict may inspire the proposals, priorities and decisions of humanitarian organizations when determining which activities to undertake and where and how to implement them (for example, who first should receive certain relief parcels from a collective relief shipment).

834 For an organization to qualify as an impartial humanitarian body in the sense of common Article 3, there is no requirement as to where it has its headquarters, which may be outside the territory of the State in which a non-international armed conflict occurs.

835 The concept of impartiality is distinct from neutrality. Even though, in reality, neutrality is often essential as an attitude in order to be able to work impartially, common Article 3 does not require organizations wishing to qualify on the basis of this provision to be 'neutral'. In the context of humanitarian activities, 'neutrality' refers to the attitude to be adopted towards the Parties to the armed conflict. Neutrality is also one of the Movement's Fundamental Principles, described as follows: 'In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.'

836 It should be noted that, while humanitarian activities may also be performed by actors which do not qualify as impartial humanitarian organizations, and such activities may alleviate human suffering, they are nevertheless not covered by common Article 3(2) nor by the principles guiding the conduct of impartial humanitarian bodies.

b. The International Committee of the Red Cross

837 Common Article 3 mentions the ICRC as an example ('such as') of an organization that qualifies as an impartial humanitarian body.

838 The ICRC is the only organization identified by name both in common Article 3(2) and in common Article 9 regarding the right to offer services. For the drafters of the Conventions, the ICRC epitomizes an impartial humanitarian body. Conversely, by virtue of it being an example of an impartial humanitarian organization, States having conferred on the ICRC the right to offer its

services have signalled that this explicit mention is contingent upon the ICRC operating at all times as an impartial humanitarian organization.

839 In the 1949 Geneva Conventions and their 1977 Additional Protocol I, there are a considerable number of provisions in which the High Contracting Parties have explicitly granted the ICRC the right to offer to perform specific humanitarian activities when it comes to international armed conflict.[779] As far as treaty law applicable to non-international armed conflict is concerned, however, only common Article 3 explicitly mentions the ICRC without linking it to specific activities. In parallel, the Movement's Statutes provide a legal basis for the ICRC to offer its services in these types of conflicts, among other types of situations.[780]

4. The offer of services

840 On the basis of common Article 3, the High Contracting Parties explicitly recognize that impartial humanitarian organizations are entitled, without being obliged, to offer any services which they deem pertinent to meet the humanitarian needs engendered by an armed conflict. Such an offer may be unconditionally made, regardless of any prior approach or request from one or more of the Parties to the conflict concerned, and regardless of any other factor which would restrain these organizations' entitlement to offer their services.

841 When an offer of services is made, it may be regarded neither as an unfriendly act nor as an unlawful interference in a State's domestic affairs in general or in the conflict in particular.[781] Nor may it be regarded as recognition of or support to a Party to the conflict. Therefore, an offer of services and its implementation may not be prohibited or criminalized, by virtue of legislative or other regulatory acts. Nothing precludes a Party to the non-international armed conflict from inviting the ICRC or other impartial humanitarian organizations to undertake certain humanitarian activities. However, as a matter of international law, these organizations are not obliged to accept such a request; it is at their discretion to decide whether or not to respond positively in any particular context.[782] When making an offer of services to one Party to a non-international armed conflict, there is no

[779] For more details, see the commentary on Article 9, para. 1315.
[780] See Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5(2)(c)–(d) and (3). For details on the origin of these Statutes, see para. 820 of this commentary.
[781] See ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 242: 'There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.'
[782] As to the special status of National Societies in this regard, see para. 820 of this commentary.

requirement in common Article 3 to make an equivalent offer to the other Party or Parties to the conflict.

842 An offer of services by the ICRC or another impartial humanitarian organization has no bearing on the international legal status of the entity to which the offer is made. As is clear from common Article 3(4), the fact that an offer of services is made to a non-State Party to the armed conflict has no impact on that Party's legal status. Likewise, an offer of services may not be interpreted as endorsement of the reasons for which the entity is engaged in an armed conflict.

843 In order for the treaty-based right to offer services to be effective, the authorities representing a Party to a non-international armed conflict should make sure that those in charge of making the decision in this regard are available to receive it.

5. The services offered

a. Humanitarian activities

844 Common Article 3 states concisely that, in the case of a non-international armed conflict, an impartial humanitarian body may offer 'its services'. The notion of services is not defined in common Article 3 and no examples are provided.

845 Common Article 9, the provision enshrining the right to offer services applicable in international armed conflict, allows the ICRC or another impartial humanitarian organization to offer to undertake 'humanitarian activities' for the 'protection' and 'relief' (a term which can be used interchangeably with the term 'assistance') of certain categories of persons.

846 The humanitarian needs engendered by an armed conflict are likely to be very much the same regardless of the conflict's legal qualification. Thus, absent any indication to the contrary, the term 'services' in common Article 3 should be interpreted broadly, i.e. as encompassing all types of humanitarian activities required to meet the needs of all persons affected by the armed conflict. The nature of the armed conflict should not have any impact on the humanitarian activities that can be offered, be they protection or relief/assistance activities.

847 Arguably, humanitarian protection and humanitarian assistance activities both have the same objective, i.e. to safeguard the life and dignity of the persons affected by the armed conflict. Therefore, in practice, they should be seen neither as separate, nor as mutually exclusive: assisting the persons affected by an armed conflict also protects them, and vice versa. Thus, activities of 'humanitarian protection' may simultaneously qualify as activities of 'humanitarian relief'. Therefore, it would go against the purpose of common Article 3 for a Party to the conflict to allow one type of activity (for example, humanitarian relief) while

refusing its consent, as a matter of principle, for the other (in this example, humanitarian protection).

848 An indication of what qualifies as 'humanitarian' can be found in the definition of the Fundamental Principle of 'humanity'. This principle, which has also been endorsed by the International Court of Justice,[783] is the first of the seven Fundamental Principles of the Movement.[784] From the definition, it can be inferred that humanitarian activities are all activities that 'prevent and alleviate human suffering wherever it may be found', and the purpose of which is to 'protect life and health and to ensure respect for the human being'.[785] The use of the term 'life' in this definition is without prejudice to the fact that humanitarian activities may also be undertaken for the benefit of dead persons, for example when it comes to handling human remains with dignity.[786]

849 Accordingly, in the context of an armed conflict, humanitarian activities are those that seek to preserve the life, security, dignity and physical and mental well-being of persons affected by the conflict, or that seek to restore that well-being if it has been infringed upon. These activities must be concerned with human beings as such. Thus, as also informed by the requirement of impartiality, humanitarian activities and the way in which they are implemented must not be affected by any political or military consideration, or by any consideration related to the person's past behaviour, including behaviour that is potentially punishable on the basis of criminal or other disciplinary norms. Humanitarian activities seek to save human life, integrity and dignity with no other motive than to accomplish this objective. Lastly, those offering to undertake humanitarian activities focus solely on the needs of the persons affected by the conflict.

850 Besides the above general considerations, the High Contracting Parties have not specified which activities may in their eyes qualify as humanitarian activities. This is not surprising given that it would be difficult to anticipate the humanitarian needs that might arise as a result of a particular armed conflict; moreover, as the nature of armed conflicts may change, so may the humanitarian needs they engender, and hence also the services that may be offered on the basis of common Article 3. It is also impossible to generically define, especially

[783] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 242.

[784] For further information about the origin and status of the Fundamental Principles, see para. 820 of this commentary.

[785] A further discussion of the principle of 'humanity' and related terms can be found in Jean S. Pictet, 'Commentary on the Fundamental Principles of the Red Cross (I)', *International Review of the Red Cross*, Vol. 19, No. 210, June 1979, pp. 130–149.

[786] Another definition of the term 'humanitarian' is included in the Humanitarian Charter (1997), para. 1, which defines the 'humanitarian imperative' as the imperative to undertake action 'to prevent or alleviate human suffering arising out of disaster or conflict'. See also Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief (1994), p. 3: 'The humanitarian imperative comes first.'

when an armed conflict lasts for several years or even decades, which activities in a particular context are of a nature to safeguard the life, security, dignity and physical and mental well-being of the persons affected.

b. Protection

851 In its ordinary meaning, to 'protect' means to 'keep safe from harm or injury'.[787] For its part, humanitarian law has as one of its core objectives to 'protect' people in situations of armed conflict against abuses of power by the Parties to the conflict.

852 Common Article 3(2) provides no guidance on which activities impartial humanitarian organizations may deploy to ensure that the Parties to a non-international armed conflict 'protect' people by complying with the applicable legal framework. Even among impartial humanitarian organizations themselves there are differing views on what constitutes protection activities. For the ICRC and the Inter-Agency Standing Committee,[788] the concept of 'protection' encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, including international humanitarian law, international human rights and refugee law.[789]

853 Accordingly, in the context of humanitarian law, 'protection activities' refer to all activities that seek to ensure that the authorities and other relevant actors fulfil their obligations to uphold the rights of individuals.[790] Protection activities include those that seek to put an end to or prevent the (re)occurrence of violations of humanitarian law (for example by making representations to the authorities or by making the law better known), and those which seek to ensure that the authorities cease or put a stop to any violations of the norms applicable to them.

854 When pursuing its protection activities in the context of a non-international armed conflict, the ICRC aims to ensure that the applicable rules of humanitarian law and, where relevant, of other applicable law are observed or implemented by all Parties to the conflict. Such activities may include visits to persons deprived of their liberty and engaging in an informed,

[787] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 1153.

[788] The Inter-Agency Standing Committee (IASC) was established in 1992 in response to UN General Assembly Resolution 46/182 on the strengthening of humanitarian assistance. It is an inter-agency forum for coordination, policy development and decision-making involving the key UN and non-UN humanitarian partners.

[789] ICRC, *Professional Standards for Protection Work carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 3rd edition, ICRC, Geneva, 2018, p. 11. See also Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, The Brookings–Bern Project on Internal Displacement, Bern, January 2011, p. 5. For further details on the concept of impartiality, see paras 831–834 of this commentary.

[790] ICRC Protection Policy, reproduced in *International Review of the Red* Cross, Vol. 90, No. 871, September 2008, pp. 751–775.

confidential dialogue with the authorities on their obligations under humanitarian law.[791] More generally, the ICRC may propose to undertake any activity which it deems necessary for the monitoring of the implementation of humanitarian law rules and other legal frameworks which may be relevant.

855 In terms of the subject matter of the Third Convention, the ICRC's offer of services to visit persons deprived of their liberty in relation to an armed conflict is particularly relevant.[792] Since the Second World War, the ICRC has been able to visit numerous persons deprived of their liberty in connection with a non-international armed conflict on this basis. In so doing, it has been able to alleviate the anguish of their families, by registering prisoners and conveying family messages.[793] The Central Tracing Agency set up pursuant to Article 123 of the Convention and which operates under the responsibility of the ICRC, has been instrumental in this regard. In non-international armed conflicts, the ICRC's offers of services usually cover also those of the Agency, and the Parties have an obligation to consider such offers in good faith.[794] Moreover, Parties to non-international armed conflicts may refer to Article 123 when concluding special agreements aimed at bringing into force all or parts of the Convention.[795]

856 When transmitting information, the Central Tracing Agency acts in the interests of its beneficiaries and therefore impresses upon authorities the humanitarian nature of its work[796] and the importance of allowing persons deprived of their liberty to inform their families.[797] The Agency may also assist authorities in their search for information on missing persons and respond to enquiries made by families.

[791] The ICRC works on the basis of confidentiality. It should be noted that this confidentiality does not relate only to the ICRC's protection activities, such as in the context of detention; it is a prerequisite for ICRC humanitarian action as a whole. Confidentiality allows the ICRC to have access to victims of armed conflict and other situations of violence, to engage in a bilateral dialogue with relevant authorities and to protect its beneficiaries as well as its staff in the field. For further information, see ICRC, 'The International Committee of the Red Cross's (ICRC's) confidential approach. Specific means employed by the ICRC to ensure respect for the law by State and non-State authorities', Policy document, December 2012, *International Review of the Red Cross*, Vol. 94, No. 887, Autumn 2012, pp. 1135–1144.

[792] See also ICRC Study on Customary International Humanitarian Law (2005), Rule 124(B), and Copenhagen Process: Principles and Guidelines (2012), Principle 11, the latter of which assumes that the ICRC will be invited to exercise its right of humanitarian initiative during non-international armed conflict.

[793] There is a customary obligation to record the personal details of persons deprived of their liberty and to allow them to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. See ICRC Study on Customary International Humanitarian Law (2005), Rules 123 and 125.

[794] On the obligation for States to assess the offer of services in good faith, see section J.7.b.

[795] On special agreements, see section K. See also Đjurović, pp. 246 and 274.

[796] See also 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019, Res. 4, Restoring Family Links while respecting privacy, including as it relates to personal data protection, para. 10.

[797] Where Additional Protocol II applies, see Article 5(2)(b) of that Protocol. See also ICRC Study on Customary International Humanitarian Law (2005), Rules 123 and 125, and para. 593 of this commentary.

857 Beyond the Geneva Conventions, the term 'protection' has come to mean different things to different actors, and not all such activities fall within the scope of common Article 3. In practice, this complicates the conceptual analysis. For example, when a military actor such as a unit participating in a UN-authorized peace-enforcement mission has been mandated to 'protect' the civilian population, different activities and approaches may come into play, including the use of armed force. Despite the use of the same term, 'protection' in this sense is very different from the approach of an impartial humanitarian organization when carrying out protection activities.

c. Relief/assistance

858 In its ordinary meaning, 'relief' means 'the alleviation or removal of pain, anxiety, or distress'.[798] As used in the Geneva Conventions, the term 'relief' mostly applies to activities to address humanitarian needs arising in emergency situations. Within the context of Additional Protocol I, this term needs to be read in conjunction with the broader term 'assistance' used in Article 81(1) thereof, which seeks also to cover longer-term as well as recurrent and even chronic needs.[799] As with protection, neither relief nor assistance are defined in the Geneva Conventions or Additional Protocols. The absence of a generic definition, or of a list of specific activities which would be covered by the term 'assistance', is in line with the fact that needs for humanitarian assistance may not necessarily be the same in every context and may evolve over time.

859 'Assistance activities' refers to all activities, services and the delivery of goods carried out primarily in the fields of health, water, habitat (the creation of a sustainable living environment) and economic security (defined by the ICRC as 'the condition of an individual, household or community that is able to cover its essential needs and unavoidable expenditures in a sustainable manner, according to its cultural standards'), which seek to ensure that persons caught up in an armed conflict can survive and live in dignity.[800] In practice, the type of relief activities will differ depending on who the beneficiaries are and the nature of their needs. Relief activities for persons wounded on the battlefield, for example, will not be the same as those undertaken for persons deprived of their liberty. It is one of the core principles of humanitarian law that, whatever the relief activity for persons not or no longer taking a direct part in hostilities, such activities should never be considered as being of a

[798] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 1215.
[799] ICRC Assistance Policy, adopted by the Assembly of the ICRC on 29 April 2004 and reproduced in *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 677–693.
[800] *Ibid.* p. 678. For examples of specific activities covered by those terms, as undertaken by the ICRC, see ICRC, *Health Activities: Caring for People Affected by Armed Conflict and Other Situations of Violence*, ICRC, Geneva, 2015, and *Economic Security*, ICRC, Geneva, 2013.

nature to reinforce the enemy's military capabilities, including, for example, the provision of medical aid to wounded fighters.

860 With regard to both protection and assistance activities, the ICRC uses modes of action, such as persuasion, on a bilateral and confidential basis to induce the authorities to meet their obligation to comply with the rules applicable to them, including those governing the provision of essential services.[801] Where the ICRC considers that its efforts are not going to bring about a satisfactory, timely response from the authorities, and that the problem is a serious one, it may simultaneously engage in appropriate support to, or substitution for, the direct provision of assistance.[802] When this happens, it should still be kept in mind that it is the Parties to the conflict which bear the primary responsibility for ensuring that humanitarian needs are met.[803] When, despite its efforts and in the case of major and repeated violations of humanitarian law, it fails to convince the authorities to assume their responsibilities in this respect, the ICRC may use other modes of action, including, under certain conditions, a public denunciation.[804]

d. Beneficiaries

861 Common Article 3 does not specify which categories of persons may be the beneficiaries of the proposed humanitarian activities. Interpreted in the context of this provision, it must be understood that humanitarian activities can be undertaken in the first place for the benefit of all persons protected by common Article 3, namely '[p]ersons taking no active part in the hostilities, including

[801] On confidentiality as the ICRC's main working method also in the field of relief activities, see para. 854 of this commentary and fn. 791.

[802] ICRC Assistance Policy, adopted by the Assembly of the ICRC on 29 April 2004 and reproduced in *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 677–693, at 682.

[803] The fact that the ICRC or another impartial humanitarian organization undertakes assistance activities and thereby replaces the authorities or supplements their efforts does not mean that it has a legal obligation to do so. This point is further demonstrated by the use of the words 'may offer' in common Article 3. The ICRC Assistance Policy (*ibid.* p. 683) clarifies the circumstances in which the ICRC will agree to act as a substitute in providing services directly to the population:

> The decision to substitute for the authorities and to provide a direct service for those affected depends on the urgency and gravity of the needs to be met. This mode of action may be considered when:
> – the needs are great and the responsible authorities are not able to meet them, or where no such authorities exist;
> – the needs are great and the responsible authorities are not willing to meet them;
> – security conditions and/or the risk that indirect assistance might be misused or ill received so require;
> – assistance will help protect the persons affected.

[804] For further information, see ICRC, 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400.

members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause'.[805]

862 Armed conflicts affect persons other than those explicitly identified in the list of persons protected by common Article 3. The article does not state, however, that those listed are the only ones for whom the ICRC or other impartial humanitarian organizations can offer their services. Further, for persons to benefit from humanitarian activities, it is not required that they be the victims of a violation of an applicable legal standard. This broad interpretation of who can be the beneficiaries of humanitarian activities is reflected in Article 81(1) of Additional Protocol I, which refers to 'the victims of conflicts', and is confirmed by subsequent practice in non-international armed conflicts: when receiving an offer of services, Parties to the conflict typically do not limit their consent for activities only to persons affected by the armed conflict who qualify as persons covered by common Article 3. Lastly, the foregoing remains without prejudice to the fact that other activities of impartial humanitarian organizations, such as those in the realm of prevention (for example, raising awareness of international humanitarian law) can and are exercised for the benefit of able-bodied combatants.

863 While not explicitly mentioned in common Article 3, the right to offer services can also relate to activities for the benefit of dead persons.[806] Similarly, while not mentioned explicitly as such, it flows from the purpose of common Article 3 that the right to offer services can, depending on the circumstances, also be exercised to protect, or safeguard the functioning of, objects benefiting the wounded and sick, such as medical establishments.

6. Addressees of an offer of services

864 Common Article 3 allows impartial humanitarian organizations to offer their services 'to the Parties to the conflict'. In the context of a non-international armed conflict, this entitles such organizations to offer their services both to a High Contracting Party to the Geneva Conventions, when it is a Party to such a conflict, and to any non-State armed group which is a Party to the conflict. Thus, an offer of services on the basis of common Article 3(2) may not be considered as interference in the armed conflict, and 'shall not affect the legal status of the Parties to the conflict'.[807]

865 While the Parties to the conflict are primarily responsible for addressing humanitarian needs, the purpose of this paragraph is to allow impartial

[805] See also ICRC Study on Customary International Humanitarian Law (2005), Rule 47(b).
[806] On the protection afforded dead persons on the basis of common Article 3, see para. 797 of this commentary.
[807] See para. 842 and section L of this commentary.

humanitarian organizations to supplement the Parties where the latter do not meet their obligations in this regard.

7. Consent

a. Requirement of consent

866 Common Article 3 states that '[a]n impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict', but does not spell out by whom, nor how, such an offer is to be responded to. In this respect, common Article 3 differs from Article 18(2) of Additional Protocol II, which explicitly addresses the requirement to obtain the consent 'of the High Contracting Party concerned' with regard to a particular type of humanitarian activities, i.e. relief actions.[808]

867 Despite the silence of common Article 3, it is clear from the logic underpinning international law in general,[809] and humanitarian law in particular, that, in principle, an impartial humanitarian organization will only be able to carry out the proposed humanitarian activities if it has consent to do so.

868 Consent may be manifested through a written reply to the organization which has made the offer but can also be conveyed orally. In the absence of a clearly communicated approval, an impartial humanitarian organization can make sure that the Party to the conflict concerned consents at least implicitly, by acquiescence, to the proposed humanitarian activities duly notified to that Party in advance.

869 In exceptional circumstances, however, seeking and obtaining the consent of the Party concerned may be problematic. This may be the case, for example, when there is uncertainty with regard to the government in control, or when the State authorities have collapsed or ceased to function.

870 In addition, there may be cases where the humanitarian needs are particularly important. Whenever such needs remain unaddressed, the humanitarian imperative would require that humanitarian activities be undertaken by impartial humanitarian organizations, such as the ICRC.

b. Consent may not be arbitrarily withheld

871 The Geneva Conventions provide no guidance on whether there are circumstances in which a Party to a non-international armed conflict may lawfully refuse its consent to an offer of services from an impartial humanitarian

[808] Similarly, for international armed conflicts to which Additional Protocol I applies, see also Article 70(1) and Article 81(1) of that Protocol. See also ICRC, 'ICRC Q&A and lexicon on humanitarian access' and *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2015, pp. 26–30.

[809] This includes a State's sovereign right to regulate access to its territory.

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organization. In 1949, at least with regard to the consent of the High Contracting Party concerned, the understanding of the requirement to obtain the consent of the Parties to the conflict concerned was set in the context of States' nearly unfettered sovereignty: the High Contracting Party to which an offer of services was made did not see its full discretion curtailed by any rules of international law. Already at the time, however, it was understood that when a Party to the conflict refused an offer of services, it would bear international legal responsibility for any ensuing consequences of a nature or effect to violate its own humanitarian obligations towards the intended beneficiaries.[810]

872 Since 1949, international law in general and humanitarian law in particular have evolved considerably to the extent that a Party to a non-international armed conflict, whether a High Contracting Party or a non-State armed group to which an offer of services is made by an impartial humanitarian body, is not at complete liberty to decide how it responds to such an offer. It has now become accepted that there are circumstances in which a Party to a non-international armed conflict is obliged, as a matter of international law, to grant its consent to an offer of services by an impartial humanitarian organization.

873 In particular, international law as informed by subsequent State practice in the implementation of the Geneva Conventions has now evolved to the point where consent may not be refused on arbitrary grounds.[811] Thus, any

[810] In relation to the same article in the First Convention, see Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 58: 'The Party to the conflict which [when additional help is necessary] refuses offers of charitable service from outside its frontiers will incur a heavy moral responsibility.'

[811] The same evolution has taken place under customary international humanitarian law; see Henckaerts/Doswald-Beck, commentary on Rule 55, pp. 196–197: '[A] humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds.' This statement is made in the context of a rule dealing with 'humanitarian relief for civilians in need'. Logically, the same rule applies with regard to offers to protect or assist the wounded, sick or shipwrecked, as it does with regard to offers of services made to protect or assist prisoners of war. There is no reason why such offers of services should be regulated differently. Otherwise, this would lead to a manifestly absurd and unreasonable situation: a Party to the conflict would be prohibited from arbitrarily refusing an offer of services for civilians but could do so when the offer of services was intended to benefit other categories of persons affected by the armed conflict. See also *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XII, p. 336, where the representative of the Federal Republic of Germany (endorsed on this point by several other delegates) stated with regard to the words 'subject to the agreement of the Party to the conflict concerned in such relief actions': '[T]hose words did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.' See also Guiding Principles on Internal Displacement (1998), Principle 25(2): 'Consent [to an offer of services from an international humanitarian organization or other appropriate actor] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.' See also Henckaerts/Doswald-Beck, commentary on Rule 124(B), p. 445. For two recent examples, see UN Security Council, Res. 2139 concerning Syria, 22 February 2014, preambular para. 10: '*condemning* all cases of denial of humanitarian access, and *recalling* that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can

impediment(s) to humanitarian activities must be based on valid reasons, and the Party to the conflict whose consent is sought must assess any offer of services in good faith[812] and in line with its international legal obligations in relation to the humanitarian needs of the persons affected by the non-international armed conflict. Thus, where a Party to a non-international armed conflict is unwilling or unable to address basic humanitarian needs, international law requires it to accept an offer of services from an impartial humanitarian organization. If such humanitarian needs cannot be met otherwise, the refusal of an offer of services would be arbitrary, and therefore in violation of international law.

874 International law does not provide authoritative clarification on how to interpret the criterion of 'arbitrariness'.[813] This assessment remains context-specific. Nevertheless, there are instances in which a refusal to grant consent will clearly not be considered arbitrary. This will be the case, for example, if the Party to which the offer is made is itself willing and able to address the humanitarian needs and actually does so in an impartial manner. Conversely, refusal may be considered arbitrary if it entails a violation of the Party's obligations under humanitarian law or other fields of international law, such as applicable human rights law. This will be the case, for example, when the Party concerned is unable or unwilling to provide humanitarian assistance to the persons affected by the armed conflict, and even more so if their basic needs enabling them to live in dignity are not met.

875 Further, it must be kept in mind that the use of starvation of the civilian population as a method of warfare is prohibited.[814] Therefore, where a lack of supplies is intended to, or can be expected to, result in the starvation of the civilian population, there is no valid reason to refuse an offer to provide humanitarian relief to the population.[815] No valid reasons to refuse such an offer exist either, for example, when the Party to which the offer of services is made is not able to address the humanitarian needs itself. Similarly, the denial of consent for the purpose, implied or express, of exacerbating civilian suffering would also qualify as arbitrary.

876 A refusal to grant consent may also be considered arbitrary when the refusal is based on adverse distinction, i.e. when it is designed to deprive persons of a certain nationality, race, religious beliefs, class or political opinion of the needed humanitarian relief or protection.

constitute a violation of international humanitarian law'; and Res. 2216 concerning Yemen, 14 April 2015, preambular para. 10, which contains identical wording as of 'recalling'.

[812] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 25.

[813] See also ICRC, 'ICRC Q&A and lexicon on humanitarian access', p. 369.

[814] See Additional Protocol II, Article 14, and ICRC Study on Customary International Humanitarian Law (2005), Rule 53.

[815] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, p. 25.

877 Military necessity is no valid ground under humanitarian law to turn down a valid offer of services or to deny in their entirety the humanitarian activities proposed by impartial humanitarian organizations.

878 At all times, the consent of a Party to a non-international armed conflict to the undertaking of humanitarian activities remains without prejudice to that Party's entitlement to impose measures of control. Such measures may include: verifying the nature of the assistance; prescribing technical arrangements for the delivery of the assistance; and temporarily restricting humanitarian activities for reasons of imperative military necessity.[816] If verification measures result in the conclusion that the activity is not impartial or not humanitarian in nature, access may be denied. The design and implementation of these controls and restrictions may not, however, be such that, for all practical intents and purposes, they amount to a refusal of consent. In other words, the right of control recognized by humanitarian law should not unduly delay humanitarian operations or make their implementation impossible. In this regard, imperative military necessity may be invoked in exceptional circumstances only in order to regulate – but not prohibit – humanitarian access, and can only temporarily and geographically restrict the freedom of movement of humanitarian personnel.[817] Such reasons of imperative military necessity might include, for example, preventing interference with an ongoing or imminent military operation.

c. Obligation to allow and facilitate rapid and unimpeded passage

879 Unlike humanitarian law applicable to international armed conflicts,[818] no treaty-based rules specifically address whether High Contracting Parties, other than those which are party to a non-international armed conflict, have an obligation to allow and facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel. It could be argued, at least tentatively, that this may be considered to be compulsory on the basis of the due diligence component enshrined in common Article 1 ('ensure respect'). In any event, when a humanitarian organization can only reach its beneficiaries by crossing through the territory of a particular State, including its national air space and territorial sea,[819] the humanitarian spirit underpinning the Conventions would suggest a legitimate expectation that that State does not abuse its sovereign rights in a manner that would be harmful to those beneficiaries. If those States were to refuse to allow and facilitate the delivery of

[816] See Additional Protocol I, Article 70(3). See also Henckaerts/Doswald-Beck, commentary on Rule 55, p. 198.
[817] See ICRC Study on Customary International Humanitarian Law (2005), Rule 56.
[818] See Additional Protocol I, Article 70(2)–(3), and the commentary on Article 9, para. 1351.
[819] For the rules delineating and regulating the territorial sea, including the right of innocent passage through it, see Part II of the 1982 UN Convention on the Law of the Sea.

relief, it would in effect preclude humanitarian needs from being addressed and thus render the consent given by the Parties to the conflict void.

K. Paragraph 3: Special agreements

1. Introduction

880 Paragraph 3 of common Article 3 invites the Parties to the conflict to conclude agreements to apply, in addition to common Article 3, 'other provisions' of the Geneva Conventions that are not formally applicable in a non-international armed conflict. As such, this paragraph reflects the rather rudimentary character of treaty-based humanitarian law applicable in such conflicts. It is important to recall in this regard that customary international humanitarian law applies even in the absence of a special agreement between the Parties to a non-international armed conflict.

881 Special agreements 'can provide a plain statement of the law applicable in the context – or of an expanded set of provisions of IHL beyond the law that is already applicable – and secure a clear commitment from the parties to uphold that law'.[820] The benefits of negotiating special agreements 'go beyond the formal terms of the document. That the parties to a conflict have been brought together to negotiate the agreement may itself be of value.'[821]

882 The Hague Convention for the Protection of Cultural Property also encourages the Parties to a non-international armed conflict to 'bring into force, by means of special agreements, all or part of the other provisions of' that Convention.[822] The possibility of concluding special agreements in international armed conflicts is set out in common Article 6 (Article 7 of the Fourth Convention).

2. Historical background

883 One of the original proposals for the application of humanitarian law to non-international armed conflicts during the preparation of the draft conventions for the 1949 Diplomatic Conference was that Parties to such conflicts 'should be invited to declare their readiness to apply the principles of the Convention'.[823] This proposal contains the origin of the concept of using a special agreement to bring all of the provisions of the Conventions into force

[820] ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, p. 16.
[821] *Ibid.* p. 17; see also Bell, p. 20.
[822] Hague Convention for the Protection of Cultural Property (1954), Article 19(2). Paragraph 4 of that article furthermore confirms that concluding such agreements does not affect the legal status of the Parties.
[823] *Report of the Preliminary Conference of National Societies of 1946*, p. 15.

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for the Parties to a non-international armed conflict. This possibility found a prominent place in almost all of the iterations of what was at the time the proposed draft article 2(4) during the Diplomatic Conference[824] and was finally retained as paragraph 3 of common Article 3.

884 A historical example of the use of such agreements in a non-international armed conflict, which was not based on any treaty provision as none existed at the time, occurred during the Spanish Civil War (1936–39), when the Parties signed parallel agreements with the ICRC accepting that it provide humanitarian services during that conflict.[825]

3. Discussion

885 Common Article 3(3) states that 'the Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. Read narrowly, the paragraph may seem to suggest that only an agreement that explicitly brings into force other provisions of one or more of the four Geneva Conventions may be considered to be a special agreement and that agreements that go beyond the provisions in the Geneva Conventions may not be considered to be special agreements. As the purpose of the provision is to encourage Parties to an armed conflict to agree to a more comprehensive set of norms that protect those who are not or no longer taking part in hostilities, however, special agreements providing for the implementation of customary international humanitarian law, or which encompass a broader set of norms than those set down in the Geneva Conventions, in particular those of Additional Protocol I, may be considered special agreements under common Article 3. In addition, agreements affirming that the Parties will not use a certain kind of weapon, or confirming or establishing rules on the conduct of hostilities, may also constitute special agreements.

886 Agreements may be merely declaratory in nature, in that they may recognize customary or treaty law obligations that are already applicable, or they may also make more detailed arrangements to implement new or existing obligations. What counts is that the provisions brought into force between the Parties serve to protect the victims of armed conflict. Indeed, a variety of types of agreements can be considered to be special agreements for the purposes of this article. Moreover, in practice a number of different means of expressing a

[824] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 120–127. See also Siordet, pp. 198–200.

[825] 'Comité International: Guerre civile en Espagne', *Revue internationale de la Croix-Rouge*, Vol. 67, No. 409, 1936, pp. 758–759. While all the Parties accepted the provision of humanitarian services by the ICRC, in other respects the agreements differed slightly from one another.

commitment to respect various humanitarian law norms have been used by non-State armed groups and other actors.[826]

887 The Parties 'should … endeavour' to make such agreements. Thus, more than merely pointing out the possibility for the Parties to conclude such agreements, the provision encourages the Parties to make a serious effort to bring into force obligations to protect victims and to limit the suffering caused by the armed conflict. The pressing nature of this exhortation is confirmed by the French version of the article, which uses the word 's'efforceront'.

888 The most straightforward case of a special agreement under common Article 3 is an agreement signed between a non-State armed group and the State against which it is engaged in hostilities or between two non-State armed groups fighting one another. Examples include the agreements concluded between the Parties to the armed conflicts in the former Yugoslavia in the 1990s to bring many provisions of the Geneva Conventions and some provisions of the Additional Protocols into force.[827] Other such agreements include the Humanitarian Exchange Accord between the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Government of Colombia, concluded in 2001;[828] the Humanitarian Cease Fire Agreement on the Conflict in Darfur, concluded in 2004;[829] the Ceasefire Code of Conduct between the Government of Nepal and CPN (Maoist), concluded in 2006;[830] and the Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, concluded in 1998.[831] Such agreements have been concluded in the context of ongoing armed conflicts and aim to regulate hostilities, allow for the delivery of humanitarian assistance, or lessen the negative effects of the conflict on the population, among other things.

889 A peace agreement, ceasefire or other accord may also constitute a special agreement for the purposes of common Article 3, or a means to implement common Article 3, if it contains clauses that bring into existence further obligations drawn from the Geneva Conventions and/or their Additional Protocols. In this respect, it should be recalled that 'peace agreements' concluded with a view to bringing an end to hostilities may contain provisions drawn from other humanitarian law treaties, such as the granting of an amnesty for fighters who have carried out their operations in accordance with the laws and customs of war, the release of all captured persons, or a

[826] See paras 894–896 of this commentary.
[827] Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia (1991); Jakovljevic, 1992a, pp. 108–110.
[828] Government-FARC Humanitarian Exchange Accord, 2 June 2001.
[829] N'Djamena Humanitarian Ceasefire Agreement on the Conflict in Darfur (2004); see also the accompanying N'Djamena Protocol on the Establishment of Humanitarian Assistance in Darfur (2004).
[830] The Code of Conduct for Ceasefire agreed between the Government of Nepal and the CPN (Maoist), Gokarna, 25 May 2006.
[831] Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines (1998).

commitment to search for the missing.[832] If they contain provisions drawn from humanitarian law, or if they implement humanitarian law obligations already incumbent on the Parties, such agreements, or the relevant provisions as the case may be, may constitute special agreements under common Article 3. This is particularly important given that hostilities do not always come to an end with the conclusion of a peace agreement.

890 Likewise, an agreement may contain obligations drawn from human rights law and help to implement humanitarian law. For instance, it may aim to make the obligation to conduct fair trials more precise or may draw on international human rights law in another way.[833] In some cases, a rule under human rights law and humanitarian law may be identical, such that it is immaterial whether the Parties to the agreement have referred to the rule as stemming from one or the other body of law. Again, any provisions in such an agreement that implement or bring into force humanitarian law may constitute special agreements for the purposes of common Article 3.

891 Special agreements may come in a number of different forms and formats. Parallel declarations or 'triangular agreements' between each Party to the conflict and a third Party such as a State or an international organization may also be special agreements, depending on the circumstances. What counts is the expression of consent of the Parties to respect or implement humanitarian law or specific obligations. This may be done via parallel declarations that were negotiated together and that contain terms showing a willingness to be bound.[834] No matter whether these are considered to be special agreements in the sense of common Article 3, when a Party to a conflict concludes an agreement with a humanitarian organization to allow it to perform humanitarian activities, such agreements may help that Party to implement its

[832] Additional Protocol II, Article 6(5): 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' See also ICRC Study on Customary International Humanitarian Law (2005), Rule 159. See e.g. Cotonou Agreement on Liberia (1993). See, however, Comprehensive Agreement on Human Rights in Guatemala (1994), Article IX(2) ('These statements by the Parties do not constitute a special agreement, in the terms of article 3 (Common), paragraph 2, second subparagraph of the Geneva Conventions of 1949.').

[833] Marco Sassòli, 'Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law', Paper presented at the Armed Groups Conference, Vancouver, 13–15 November 2003, p. 10. Confirming the inclusion of human rights law obligations in agreements, Sivakumaran, 2012, pp. 131–132. See also Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines (1998).

[834] This was the case of one of the commonly cited historical examples of a special agreement in a non-international armed conflict, between the ICRC and each of the Parties to the Spanish Civil War. As a more recent example, parallel unilateral declarations were made by the Government of the Democratic Republic of the Congo and the non-State armed group M23 in December 2013: see UN Security Council, *Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region*, 23 December 2013, UN Doc. S/2013/773, paras 3–11.

obligations under humanitarian law or bring into force other provisions of the Conventions.

892 If an agreement is in written form, it will likely be easier to prove the precise terms of the commitments made by the Parties. This is certainly the case for agreements that implement a broad scope of humanitarian law obligations. In addition, agreements setting out safety zones or hospital zones, or setting out judicial guarantees, for example, should be in writing.[835] However, in some circumstances, on a narrow issue, it may not be essential to have an agreement in writing if it is done in such a way that it can be relied upon. Thus, for example, a clear commitment to allow access for the provision of humanitarian relief, agreed by all Parties and widely broadcast or otherwise effectively communicated, will constitute a special agreement for the purposes of common Article 3. That said, the agreement should be sufficiently detailed so that obligations and expectations are clear.[836]

893 It must be underscored that even if the Parties have agreed to a more limited number of additional provisions, they nevertheless remain bound by all applicable humanitarian law norms. Moreover, such agreements cannot derogate from applicable humanitarian law so as to lessen the protection of that law. This conclusion flows from a plain reading of the text of common Article 3, which states that 'each Party to the conflict shall be bound to apply, as a minimum' the provisions of the article.[837] This approach is also taken in common Article 6 (Article 7 in the Fourth Convention), which specifies that special agreements in international armed conflict may not adversely affect the situation of the persons protected by the Conventions, nor restrict the rights conferred upon them.

894 It should be noted in addition that Parties to non-international armed conflicts often conclude agreements with other Parties to the conflict, with their allies and with international organizations. Many, but not all, of these agreements may constitute special agreements within the meaning of common Article 3. The purpose of the provision is to encourage Parties to a non-international armed conflict to agree to a more comprehensive set of norms that protect those who are not or no longer taking part in hostilities, as well as to better implement existing obligations. While agreements providing for the implementation of customary international humanitarian law, or which encompass a broader set of norms than those set down in the Geneva Conventions that are concluded between allies, rather than between the

[835] See e.g. the commentaries on Article 23 of the First Convention and Article 14 of the Fourth Convention.

[836] In addition to the benefits of detailed agreements in general, it is worth recalling that 'mere awareness of IHL … [is] not sufficient to produce a direct impact on the behaviour of the combatants'; ICRC, *The Roots of Behaviour in War*, p. 11.

[837] Furthermore, Parties may not derogate from obligations under customary international humanitarian law, nor from the provisions of Additional Protocol II where it is applicable, or other humanitarian law treaties applicable in non-international armed conflict.

Parties to the conflict, are not special agreements in the sense of the provision, they may nevertheless be a welcome and effective means to ensure respect for humanitarian law.

895 Non-State armed groups and governments have also signed declarations or agreements with international organizations with special expertise in order to commit the group or State to improving its compliance with respect to a specific issue. Some of these may be construed as a type of unilateral declaration, while others may be two or more party agreements.[838] For example, a faction of the Sudan Liberation Army signed an 'action plan' with UNICEF in which it 'pledged to end recruitment and release all children under the age of 18'.[839] The UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict has signed such 'action plans' with a number of other non-State armed groups and States to prevent and/or halt the use or recruitment of children in armed conflicts.[840] In a similar vein, non-State armed groups have signed deeds of commitment with a non-governmental organization, Geneva Call, in which they pledged their commitment to respect humanitarian law in specific areas.[841] Thus, an express commitment need not be between the Parties to the conflict in order to clarify obligations of humanitarian law for that Party.

896 Indeed, it is not uncommon for non-State armed groups to undertake to respect humanitarian law through various mechanisms. These include the special agreements provided for in common Article 3, as well as unilateral declarations, codes of conduct, or the signing of a 'deed of commitment' or 'action plan', to name a few.[842] All of these mechanisms provide 'an

[838] ICRC, *Improving Compliance with International Humanitarian Law, ICRC Expert Seminars*, October 2003, p. 21; Roberts/Sivakumaran, p. 142.

[839] UN Security Council, *Annual report on the activities of the Security Council Working Group on Children and Armed Conflict, established pursuant to resolution 1612 (2005) (1 July 2007 to 30 June 2008)*, annexed to UN Doc. S/2008/455, 11 July 2008, para. 11(c). In a similar vein, a tripartite agreement between the Government of the Central African Republic, the Union des forces démocratiques pour le rassemblement (UDFR) and UNICEF was signed in June 2007, 'in which the UDFR agreed to separate and release all children associated with its armed group; and facilitate their reintegration'; see also UN General Assembly, *Report of the Secretary-General on children and armed conflict*, UN Doc. A/63/785-S/2009/158, 26 March 2009. The latter two documents are cited in Bellal/Casey-Maslen, p. 190.

[840] UN General Assembly, *Report of the Secretary-General on children and armed conflict*, UN Doc. A/66/782-S/2012/261, 26 April 2012; *Report of the UN Secretary-General on children and armed conflict*, UN Doc. A/67/845-S/2013/245, 15 May 2013 (reissued 30 July 2013). See also Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Action Plans with Armed Forces and Armed Groups, http://childrenandarmedconflict.un.org/our-work/action-plans/.

[841] Geneva Call has three Deeds of Commitment: Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action; Deed of Commitment for the Protection of Children from the Effects of Armed Conflict; and Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination, http://www.genevacall.org/how-we-work/deed-of-commitment/.

[842] For a list of such commitments, see Sivakumaran, 2012, pp. 143–151, and more generally pp. 107–152. See also ICRC, 'A collection of codes of conduct issued by armed groups', *International Review of the Red Cross*, Vol. 93, No. 882, June 2011. For examples of

opportunity for a party to a conflict to make an "express commitment" of their willingness or intention to comply with IHL' and should be encouraged.[843] Especially when these are detailed and accompanied by sincere and concrete efforts to implement the commitments contained therein, they can be effective in strengthening respect for humanitarian law.[844] However, the absence of any such commitment does not reduce the obligations of non-State armed groups to abide by treaty and customary international law.

897 Whether a Party has taken on additional obligations under humanitarian law through a special agreement, unilateral declaration or other means of commitment, including in a code of conduct, it should be able to respect the obligations it has undertaken. This ensures that the agreements are not empty words that, in the end, may lessen respect for humanitarian law.

898 An impartial humanitarian organization such as the ICRC may offer its services to facilitate the conclusion of special agreements or to help to implement them.[845] While there may be no general obligation to conclude a special agreement, in some circumstances it may be a vital means of respecting existing obligations under humanitarian law, such as enabling the wounded and sick to be collected and cared for or to address the fate of the missing. It is also important to note that, where Parties to an agreement wish to assign a specific monitoring or oversight role to a third party, they should ensure that they have the consent of that entity for the role in question.

899 Lastly, it is useful to recall that the capacity to make special agreements is closely linked to the observation in common Article 3(4) that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict'. Thus, it cannot be deduced that the recognition of the capacity to

unilateral declarations, codes of conduct and special agreements, see http://theirwords.org/, a database maintained by the non-governmental organization Geneva Call. See also Ewumbue-Monono, pp. 905–924; Veuthey, pp. 139–147; Roberts/Sivakumaran, pp. 107–152; and ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, 2008. These references provide some practical examples of the types of subjects on which special agreements have been made.

[843] ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts.* Draft article 38 of Additional Protocol II, which was deleted during the general shortening of the Protocol at the Diplomatic Conference, also provided for the making of unilateral declarations; see *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. IX, pp. 245–246, paras 45–50. See also 27th International Conference of the Red Cross and Red Crescent, Res. 1, Adoption of the Declaration and the Plan of Action, Annex 2: Plan of Action for the years 2000–2003, para. 1.1.3: 'Organised armed groups in non-international armed conflict are urged to respect international humanitarian law. They are called upon to declare their intention to respect that law and teach it to their forces.'

[844] ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*; Sassòli 2010, p. 30; Roberts/Sivakumaran, pp. 126–134.

[845] For example, the ICRC was involved in the conclusion of the 1991–92 agreements in the conflicts in the former Yugoslavia. See also common Article 3(2) on the right of an impartial humanitarian body to offer its services to the Parties to the conflict.

conclude special agreements bringing into force additional obligations in the Conventions implies recognition of belligerency or in any way signifies that the non-State Party to the agreement possesses full international legal personality.[846] It is not uncommon for Parties to special agreements to reiterate that the agreement does not affect their legal status.[847] Even if it is considered that special agreements do not prevail over national law in the same way that an international treaty might, national law should not be invoked to hinder the implementation of a special agreement negotiated in good faith by the Parties to the conflict.[848]

L. Paragraph 4: Legal status of the Parties to the conflict

1. *Introduction*

900 This clause, which affirms that '[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict', is essential. It addresses the fear that the application of the Convention, even to a very limited extent, in cases of non-international armed conflict may interfere with the *de jure* government's lawful suppression of armed activity. This clause makes absolutely clear that the object of the Convention is purely humanitarian, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the essential rules of humanity which all nations consider as valid everywhere, in all circumstances.

[846] See van Steenberghe, pp. 51–65.

[847] In addition, a provision to this effect is included in Geneva Call's standard Deeds of Commitment.

[848] Article 3 of the 1969 Vienna Convention on the Law of Treaties specifies that the Convention does not apply to (but at the same time acknowledges the existence of) 'international agreements concluded between States and other subjects of international law or between such other subjects of international law'. Whether or not they constitute treaties under international law, special agreements concluded between Parties to non-international armed conflicts arguably create obligations under international law. The ICTY considered that at least one of the special agreements between the Parties to the conflict under its jurisdiction was binding and, in the words of one commentator, 'akin to treaties'; the International Commission of Inquiry on Darfur came to a similar conclusion with respect to agreements between the Sudan Liberation Movement/Army and the Justice and Equality Movement; see Sivakumaran, 2012, p. 109. While an ICTY trial chamber relied on a special agreement as a source of legal obligations to sustain a conviction in one case, on appeal the Tribunal preferred to base the same obligation on customary international humanitarian law. See *Galić* Trial Judgment, 2003, and Appeal Judgment, 2006. More frequently, the Tribunal has relied on such agreements for evidentiary purposes; see Vierucci, 2011, p. 423. In some cases, agreements between non-State armed groups and States have not been considered to be treaties under international law, but nevertheless to be 'capable of creating binding obligations and rights between the parties to the agreement in municipal law'; SCSL, *Kallon and Kamara* Decision on Challenge to Jurisdiction, 2004, para. 49. This decision has been criticized, however: Cassese, pp. 1134–1135. See also Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgment, 1995, para. 17. For a discussion of the status of special agreements, see also Vierucci, 2015, pp. 515–517.

2. Historical background

901 The drafting history of the provision is straightforward. It was first suggested at the Conference of Government Experts convened by the ICRC in 1947 and was reintroduced with very little change in all successive drafts.[849] Without it, neither common Article 3, nor any other article in its place, could have been adopted. It should be recalled, however, that the scope of humanitarian law that was to apply in non-international armed conflicts changed dramatically from the beginning of the process to the end. The original proposal for paragraph 4 of draft article 2 discussed at the 1949 Diplomatic Conference stated:

> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.[850]

902 For reasons explained above, instead of agreeing to apply the whole of the Conventions in non-international armed conflicts, the delegates at the Diplomatic Conference settled on common Article 3 as we know it today.[851] The assertions by delegates at the Conference of the implications of applying humanitarian law to non-international armed conflicts, in particular that it would 'appear to give the status of belligerents to insurgents, whose right to wage war could not be recognized' must be seen in this light.[852] It was not that the application of any humanitarian law rules whatsoever posed a problem, but in their view applying the whole body of the law could do.[853]

3. Discussion

903 This provision confirms that the application of common Article 3 – or, perhaps more accurately, a State's acknowledgement that common Article 3 and customary international humanitarian law obligations apply to a conflict involving a non-State armed group – does not constitute any recognition by the *de jure* government that the adverse Party has any status or authority of any kind; it does not limit the government's right to fight a non-State armed group using all lawful means; and it does not affect its right to prosecute, try and sentence

[849] *Report of the Conference of Government Experts of 1947*, p. 9.
[850] See *Draft Conventions adopted by the 1948 Stockholm Conference*, p. 10.
[851] For details, see section B.
[852] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 10.
[853] States were in particular concerned about the application of prisoner-of-war status; *ibid.* pp. 10–11. The fact that the application of humanitarian law has no impact on the legal status of the Parties must thus be understood in the narrower sense relating to the status of belligerents, and not the wider question of the existence (or not) of the international legal personality of non-State armed groups. On this debate, see Moir, pp. 65–66.

its adversaries for their crimes, in accordance with its own laws and commensurate with any other international legal obligations that may apply to such procedures.[854] The same holds true in respect of the conclusion of special agreements. Indeed, the application of common Article 3 to a non-international armed conflict does not confer belligerent status or increased authority on the non-State armed group.

904 Despite the clarity of this provision, States sometimes nevertheless continue to have reservations about a situation being classified as a non-international armed conflict, often due to a concern that such classification somehow confers a certain status or legitimacy on non-State armed groups, be it legal or political.[855] This may be due in part to a lack of willingness to sit down to negotiate on a particular issue with a non-State Party to a conflict that a government has labelled as terrorist, or engage with a non-State Party on wider issues such as a peace settlement. Importantly, it is not necessarily because of a lack of willingness to apply and respect humanitarian law.[856] Indeed, although States may continue to deny the existence of a non-international armed conflict for a variety of reasons, including that by doing so they would legitimize the non-State Party to the armed conflict, the principle that the application of humanitarian law does not change the status of the Parties is widely accepted today.[857]

905 This provision confirms that, while humanitarian law provides for equal rights and obligations of the Parties to the conflict in the treatment of people in their power, it does not confer legitimacy on non-State armed groups that are Parties to a conflict.

906 Furthermore, it serves to underline that, as international humanitarian law applies based on the facts, regardless of whether a State qualifies the members of a non-State armed group as 'terrorists' or its actions as 'terrorism', humanitarian law applies if and when the conditions for its applicability are met.

907 The denial that groups that a State has labelled as 'terrorist' may be a Party to a non-international armed conflict within the meaning of humanitarian law

[854] See, however, Article 6(5) of Additional Protocol II, which urges the authorities in power, at the end of hostilities, to 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. See also ICRC Study on Customary International Humanitarian Law (2005), Rule 159.

[855] United Kingdom, *Manual of the Law of Armed Conflict*, 2004, pp. 386–387, para. 15.3.1; Fleck, pp. 589–591, para. 1202.

[856] Sivakumaran, 2012, pp. 209 and 546–549.

[857] A similar provision has been adopted in the context of the 1980 Convention on Certain Conventional Weapons and in other humanitarian law treaties. See Hague Convention for the Protection of Cultural Property (1954), Article 19(4); Amended Protocol II to the Convention on Certain Conventional Weapons (1996), Article 1(6); Second Protocol to the Hague Convention for the Protection of Cultural Property (1999), Article 22(6); and Amendment to Article 1 of the 1980 Convention on Certain Conventional Weapons (2001), Article 1(6). See also the opinion of the Constitutional Court of Colombia on the conformity of Additional Protocol II: *Constitutional Case No. C-225/95*, Judgment, 1995, para. 15.

carries the risk that the non-State armed group loses an incentive to abide by that body of law. This in turn reduces the ability of humanitarian law to serve its protective purpose. Humanitarian law seeks to protect civilians and all those who are not directly participating in hostilities; it does this in part by obliging Parties to distinguish between civilians and civilian objects and military objectives.

908 Nothing since the introduction of common Article 3 in 1949 has altered the fact that the applicability of humanitarian law to situations of non-international armed conflicts does not affect the legal status or enhance the legitimacy of non-State armed groups. This remains as essential today as it was at that time, as any other interpretation will almost inevitably lead States to deny the applicability of common Article 3 and thereby undermine its humanitarian objective.

M. Criminal aspects and compliance

1. Introduction

909 Common Article 3 lacks compliance mechanisms that were included in the Conventions for international armed conflicts, such as the Protecting Powers, the conciliation procedure and the enquiry procedure. Most importantly, it does not provide for the criminal responsibility of individuals who violate its provisions. However, both treaty and customary international law have evolved significantly over the past decades and filled some of these lacunae.

2. Individual criminal responsibility in non-international armed conflicts

910 The 1949 Diplomatic Conference discussed only briefly the issue of individual criminal responsibility for violations of common Article 3. A few States wished for common Article 3 to include the possibility for States to consider violations of this article as war crimes.[858] These States were mainly those which supported the application of most of the provisions of the 1949 Conventions to non-international armed conflicts. However, at the time, most States rejected this proposal.[859] The majority view was that, except for Article 3, the provisions of the four Geneva Conventions were not applicable in non-international armed conflicts.[860] Similarly, the discussions on the grave breaches provisions

[858] This was the view expressed by the Italian delegate; see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 49.
[859] See La Haye, 2008, p. 133.
[860] See the view expressed by the Rapporteur of the Special Committee, Mr Bolla, during the discussions on common Article 3: 'The Special Committee voiced a definite opinion that the provisions of the Conventions were, on principle, not applicable to civil war, and that only certain stipulations expressly mentioned would be applicable to such conflicts.' *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 36–37.

during the 1949 Diplomatic Conference show that their application in non-international armed conflicts was not envisaged.[861]

911 Prosecutions of individuals for serious violations of common Article 3 were left to the discretion of States on the basis of their domestic criminal codes. They seldom occurred until the 1990s.[862] The adoption of the Statutes of the International Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994 marked a turning point in the recognition of individual criminal responsibility in non-international armed conflicts, including for serious violations of common Article 3. The debates in the UN Security Council leading to the establishment of these Tribunals illustrate the change in State practice, as some members of the Security Council understood Article 3 of the ICTY Statute, on violations of the laws or customs of war, to include

> all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.[863]

912 The ICTY Appeals Chamber interpreted Article 3 of the ICTY Statute to be 'a general clause covering all violations of humanitarian law' and specifically to include serious violations of common Article 3 and other customary law rules applicable in non-international armed conflicts.[864] It found that:

> [C]ustomary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.[865]

[861] See e.g. the Fourth Report drawn up by the Special Committee of the Joint Committee, where it is made clear that the grave breaches regime is only applicable to the gravest violations in international armed conflicts; *ibid*. pp. 114–118.

[862] On the absence of domestic prosecutions for serious violations of common Article 3, see Perna, pp. 139–143.

[863] Statement by the US representative in UN Security Council, *Provisional verbatim record of the three thousand two hundred and seventeenth meeting*, UN Doc. S/PV.3217, 25 May 1993, p. 15. See also the statement by France on p. 11 ('[T]he expression "laws or customs of war" used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed'), and by the United Kingdom on p. 18.

[864] ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 89.

[865] *Ibid.* para. 134. These conclusions were shared by the ICTR Trial Chamber in *Akayesu*, where it took the view that: '[I]t is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds. … The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator.' *Akayesu* Trial Judgment, 1998, paras 616–617.

913 The ICTR Statute is the first international instrument to criminalize serious violations of common Article 3.[866] In 1998, despite the opposition of a small group of States,[867] a large majority of States supported the inclusion of war crimes in non-international armed conflicts within the subject-matter jurisdiction of the ICC, in particular the inclusion of serious violations of common Article 3.[868] As a result, the ICC Statute contains an important list of war crimes applicable in non-international armed conflicts, including serious violations of common Article 3.[869]

914 Today, the principle of individual criminal responsibility for war crimes in non-international armed conflicts is part of customary international law. A large number of national laws, including ICC implementing legislation and criminal codes, as well as military manuals, qualify serious violations of common Article 3 as war crimes. Numerous unilateral statements made by States in the Security Council or during the negotiations that led to the adoption of the ICC Statute show that, for most States, practice is coupled with a strong belief that perpetrators of serious violations of common Article 3 should be held criminally responsible.[870]

[866] See UN Security Council, *Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994)*, UN Doc. S/1995/134, 13 February 1995, para. 12, stating that 'the [ICTR] statute … for the first time criminalizes common article 3 of the four Geneva Conventions'. Interestingly, at the time of the adoption of the ICTR Statute in 1994, the Special Rapporteur of the UN Commission on Human Rights on the situation of human rights in Rwanda reported that: 'Many of the acts alleged, such as murder, political assassination, execution of hostages and other inhuman acts committed against the civilian population or unarmed soldiers by the armed forces of the two parties to the conflict constitute war crimes in direct violation of the four Geneva Conventions of 12 August 1949, which have been ratified by Rwanda, and their common article 3.' See UN Commission on Human Rights, *Report on the situation of human rights in Rwanda*, UN Doc. E/CN.4/1995/7, 28 June 1994, para. 54.

[867] See e.g. the statement made by India to the UN Committee of the Whole on 18 June 1998, averring that 'there could not be a homogeneous structure of treatment of international and non-international armed conflicts so long as sovereign States existed'. UN Committee of the Whole, *Summary record of the 5th meeting*, UN Doc. A/CONF.183/C.1/SR.5, 20 November 1998, p. 13.

[868] See e.g. the statement by Bangladesh on 18 June 1998: '[Bangladesh] strongly supported giving full effect to the common article 3 of the 1949 Geneva Conventions. … [T]he distinction between international and non-international conflicts was becoming increasingly irrelevant, viewed in terms of universal peace and security.' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary record of the 7th plenary meeting*, UN Doc. A/CONF.183/SR.7, 25 January 1999, pp. 4–5. On another occasion, the US representative stated: 'The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. … The United States urges that there should be a section … covering other rules regarding the conduct of hostilities in non-international armed conflicts.' Statement by the US delegation to the Preparatory Committee on the Establishment of an International Criminal Court, 23 March 1998, http://www.amicc.org/docs/USDel3_23_98.pdf. For more examples and analysis, see La Haye, 2008, pp. 162–164.

[869] See ICC Statute (1998), Article 8(2)(c), covering serious violations of common Article 3, and Article 8(2)(e), listing other serious violations of the laws and customs applicable in armed conflicts not of an international character.

[870] For a detailed study of this topic and the establishment of this principle as a customary rule, see La Haye, 2008, pp. 131–251. See also ICRC Study on Customary International Humanitarian Law (2005), Rules 151 and 156; Moir, pp. 233–235; and Sivakumaran, 2012, pp. 475–478.

915 The recognition that serious violations of common Article 3 amount to war crimes has opened new avenues for both international courts and tribunals and domestic courts to prosecute alleged offenders. International courts and tribunals, such as the ICTY, the ICTR, the ICC, the SCSL and the Iraqi Special Tribunal, have been set up to prosecute alleged offenders for serious violations of common Article 3, among other international crimes.

916 Alleged perpetrators can be prosecuted by the courts of the State on whose territory the offences were committed, the State of nationality of the victim, or the State of their own nationality. In non-international armed conflicts, these three possible States will mostly be one and the same, namely the territorial State. The national courts of the territorial State, when functioning, seem to be the best fora for such cases. They have direct access to evidence and witnesses and knowledge of local customs and geography. Their judgments carry both a real and symbolic weight: the victims can see justice being done, and this can have a positive impact on reconciliation, while also acting as a deterrent to future criminal conduct.[871] However, governments do not always pursue this solution; those in power might protect suspected criminals, be the perpetrators of war crimes themselves or pass amnesty laws. Even if willing to prosecute, governments may lack the financial, technical or human resources to carry out fair trials.[872]

917 The grave breaches regime has not been extended to serious violations of common Article 3. Thus, States are not obliged, on the basis of the Geneva Conventions, to search for alleged perpetrators of these serious violations, regardless of their nationality, and to bring them before their own courts.[873] However, it is accepted in customary law that States have a right to vest universal jurisdiction over war crimes, including serious violations of common Article 3, in their domestic courts.[874]

918 Furthermore, States are under an obligation to investigate war crimes allegedly committed by their nationals or armed forces or on their territory

[871] There have been some national prosecutions in countries that have suffered from non-international armed conflicts, such as Bosnia and Herzegovina, Croatia, Ethiopia, Kosovo and Rwanda. For an overview of national prosecutions, see La Haye, 2008, pp. 256–270. For the many prosecutions carried out in Bosnia and Herzegovina, see http://www.sudbih.gov.ba/?jezik=e.

[872] See La Haye, 2008, p. 216; Morris, pp. 29–39; and Blewitt, pp. 298–300.

[873] See the discussion of this issue in the commentary on Article 129, section G.

[874] See ICRC Study on Customary International Humanitarian Law (2005), Rule 157. For a contrary view on the customary nature of this rule, see John B. Bellinger III and William J. Haynes II, 'A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*', *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 443–471; but see Jean-Marie Henckaerts, '*Customary International Humanitarian Law*: a Response to US Comments', *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 473–488.

and, if appropriate, prosecute the suspects.[875] This customary obligation is applicable in both international and non-international armed conflicts.

919 As at 2015, there seem to have been only 17 reported cases over the previous 60 years where domestic courts or tribunals have exercised universal jurisdiction over perpetrators of war crimes.[876] Interestingly, the vast majority of these cases arose in the last 20 years and concerned events which took place in non-international armed conflicts. This limited number of national prosecutions based on universal jurisdiction can be explained by a variety of factors. The likelihood of prosecutions on the basis of universal jurisdiction is usually dependent on the presence of the alleged offender in a country which is willing and able to extend its jurisdiction over the offender. Some prosecutions on the basis of universal jurisdiction have faced insurmountable problems of proof. Access to evidence and witnesses, and obtaining the cooperation of the authorities of the States where the crimes have been committed, can be difficult. The distance between the domestic courts of a third State and the place and time of the suspected criminal conduct makes the prosecution's work hazardous and can lead to acquittal for lack of evidence.[877] Lastly, such prosecutions can be costly for the State carrying them out. Nevertheless, prosecutions by the domestic courts of other States can be a valuable alternative in the absence of prosecution in the States where the crimes were committed, as well as a necessary complement to prosecutions by international courts or tribunals.[878]

3. *Serious violations of common Article 3 as war crimes*

920 The commission of the prohibited acts listed in paragraph 1(a)–(d) of common Article 3 has been found to engage the individual criminal responsibility of perpetrators in non-international armed conflicts. Murder, mutilation, cruel treatment, torture, hostage-taking, outrages upon personal dignity and denial of a fair trial have been explicitly included as war crimes in non-international armed conflicts in the ICTR, ICC and SCSL Statutes.[879] Furthermore, they have been prosecuted as serious violations of the laws or customs of war under Article 3 of the ICTY Statute. These prohibited acts have also been included as

[875] See ICRC Study on Customary International Humanitarian Law (2005), Rule 158. Note also the preamble to the 1998 ICC Statute, which recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.
[876] For an overview of these cases, see ICRC, *Preventing and repressing international crimes*, Vol. II, pp. 123–131, and National Implementation of IHL database, https://www.icrc.org/ihl-nat.
[877] For some examples of domestic prosecutions, see La Haye, 2008, pp. 243–256.
[878] See *ibid.* pp. 270–273.
[879] See ICTR Statute (1994), Article 4(a)–(g); ICC Statute (1998), Article 8(2)(c); and SCSL Statute (2002), Article 3(a)–(g).

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war crimes or serious violations of humanitarian law in a great number of national laws.[880]

921 The ICC Elements of Crimes makes no distinction for these offences based on the nature of the armed conflict.[881] Similarly, the international criminal tribunals have applied the same elements of crimes for these offences, whether committed in international or non-international armed conflicts.[882]

922 The list of war crimes applicable in non-international armed conflicts goes beyond the list of prohibited acts contained in common Article 3(1). This list is complemented by the crimes set out in Article 8(2)(e) of the ICC Statute, and by others recognized in treaty or customary law.[883]

923 As to the prohibition of 'violence to life and person', Article 8(2)(c)(i) of the ICC Statute restates common Article 3, listing '[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' as war crimes under the Statute in non-international armed conflicts. However, the 2002 ICC Assembly of States Parties did not adopt elements of crimes for violence to life and person, but only for the specific crimes of murder, mutilation, cruel treatment and torture. This indicates that the Assembly did not envisage prosecutions for charges of violence to life and person as such under the ICC Statute.

924 Furthermore, a 2002 ICTY judgment took a cautious approach to the war crime of violence to life and person. In *Vasiljević*, the Trial Chamber, in view of the *nullum crimen sine lege* principle – which, *inter alia*, requires criminal law provisions to be sufficiently 'precise to determine conduct and distinguish the criminal from the permissible'[884] – rejected war crimes charges of 'violence to life and person', while convicting the accused of the specific war crime of murder.[885]

[880] For details on these laws, see ICRC, Customary International Humanitarian Law, practice relating to Rule 89 (murder), Rule 90 (torture, cruel treatment and outrages upon personal dignity), Rule 92 (mutilation), Rule 96 (hostage-taking) and Rule 100 (denial of fair trial), section V, https://www.icrc.org/customary-ihl/eng/docs/v2_rul.

[881] The sole distinction between the war crimes applicable in international and non-international armed conflict stems from the nature of the victim in question: war crimes in non-international armed conflict are committed against persons protected under common Article 3, whereas war crimes committed in international armed conflict are committed against persons protected under the Geneva Conventions.

[882] For more details on the criminal-law aspects of most of these crimes, see the commentary on Article 130, section D.

[883] See, in particular, Henckaerts/Doswald-Beck, commentary on Rule 156, pp. 597–603.

[884] See ICTY, *Vasiljević* Trial Judgment, 2002, para. 193.

[885] See *ibid.* paras 193–204 and 307–308. For a different view, see ICTY, *Blaškić* Trial Judgment, 2000, pp. 267–269, where convictions were entered for the war crime of violence to life and person (later reversed on appeal). In its judgment in *Kordić and Čerkez*, the ICTY Trial Chamber agreed with the description of the war crime of violence to life and person used in *Blaškić*; however, considering the parallel war crime charges of 'wilfully causing great suffering' and 'inhuman treatment' as more specific to acts that did not result in the death of the victim, no convictions for violence to life and person were entered; see *Kordić and Čerkez* Trial Judgment, 2001, paras 260 and 821.

925 For the purposes of international criminal law, it is therefore doubtful whether a sufficiently precise definition of a war crime of 'violence to life and person' has developed.[886] However, this has no bearing on the underlying prohibition of violence to life and person under common Article 3. Humanitarian law prohibitions exist independently of whether a violation of these prohibitions has consequences under international criminal law.

926 For the war crime of mutilation, Article 8(2)(c)(i) of the ICC Statute lists mutilation as a serious violation of common Article 3, while Article 8(2)(e)(xi) lists it as a serious violation of the laws and customs of war in non-international armed conflicts. The ICC Elements of Crimes distinguishes between the two offences. As mutilation is a serious violation of common Article 3, it is not necessary to prove that it caused death or seriously endangered the physical or mental health of the victim, while such proof is required for a violation of the laws and customs of war. The fact that this element does not apply to mutilation as a serious violation of common Article 3 has been confirmed by the SCSL Trial Chamber.[887]

927 The choice made by States to criminalize only the prohibitions listed in paragraph 1(a)–(d) of common Article 3 has no impact on the strength of the other obligations contained in the article, including the overarching obligation to treat humanely persons not or no longer taking an active part in hostilities, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

4. State responsibility for violations of common Article 3

928 A State Party that commits a violation of common Article 3 may be responsible under the rules of State responsibility, in the same way as for any violation of the Geneva Conventions.[888] In some human rights cases, States have been found to have violated common Article 3.[889] States may also be held responsible for the acts of non-State armed groups, if these acts are attributable to it.[890] This will be the case, for example, if the armed group acts in fact on the instructions of or under the direction of that State.

929 The responsibility of armed groups for violations of common Article 3 can also be envisaged if the armed group becomes the new government of a State or

[886] Along the same lines, see e.g. SCSL, *Fofana and Kondewa* Trial Judgment, 2007, para. 145, referring to ICTY, *Vasiljević* Trial Judgment, 2002.
[887] SCSL, *Brima* Trial Judgment, 2007, para. 725; *Sesay* Trial Judgment, 2009, para. 182.
[888] See Draft Articles on State Responsibility (2001), Articles 1 and 4; Henckaerts/Doswald-Beck, commentary on Rule 149, pp. 530–536; and Dinstein, pp. 116–126.
[889] See Inter-American Commission on Human Rights, *Case 10.480 (El Salvador)*, Report, 1999, para. 82; *Case 10.548 (Peru)*, Report, 1997, para. 88; and *Case 11.142 (Colombia)*, Report, 1997, para. 202; all three cases cited in Sivakumaran, 2015, p. 429, fn. 62.
[890] See Draft Articles on State Responsibility (2001), Article 8, and Henckaerts/Doswald-Beck, commentary on Rule 149, pp. 534–536.

the government of a new State. In these circumstances, the conduct of the armed group will be considered as an act of that State under international law.[891]

930 When a non-State armed group is not successful at becoming the new government or the government of a new State, the State Party to that non-international armed conflict will not bear any responsibility for violations of common Article 3 committed by non-State armed groups.[892]

931 International law is unclear as to the responsibility of a non-State armed group, as an entity in itself, for acts committed by members of the group.[893]

5. Preventive measures and monitoring compliance

a. Preventive measures

932 The Geneva Conventions contain a number of measures that Parties to a non-international armed conflict should put in place to enhance respect for common Article 3 and prevent or stop violations thereof.

933 Common Article 3 does not contain an obligation to disseminate the content of the provision. However, Article 127 of the Third Convention sets out the obligation to 'disseminate the text' of the Convention, which includes common Article 3, as widely as possible.[894] Spreading knowledge of the content of the law applicable in non-international armed conflicts to the armed forces of a State and the public at large is a significant step in ensuring the effective application of the law, as well as compliance with the provisions of common Article 3.[895]

934 As the obligation to disseminate contained in Article 127 also covers common Article 3, States Parties are already under an obligation in peacetime to include the study of common Article 3 in programmes of military and, if possible, civil instruction.[896] The methods of dissemination are left to States

[891] See Draft Articles on State Responsibility (2001), Article 10. See also Dinstein, pp. 126–130.

[892] State responsibility might be engaged if a State failed to take available steps to protect, for example, the premises of the diplomatic missions of a neutral State (see Draft Articles on State Responsibility (2001), commentary on Article 10, p. 52, para. 15), but it will not be responsible for violations of common Article 3 committed by a non-State armed group.

[893] For an analysis of this issue, see Zegveld, and Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution', in Noemi Gal-Or, Math Noortmann and Cedric Ryngaert (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, Brill, Leiden, 2015, pp. 304–322.

[894] See also the commentary on Article 127, para. 5037; Sivakumaran, 2012, p. 431; Moir, p. 243; and Draper, p. 27.

[895] See also Article 19 of Additional Protocol II, which states: 'This Protocol shall be disseminated as widely as possible.'

[896] For more details, see the commentary on Article 127.

Parties.[897] Making the content of common Article 3 familiar to the entire population will help create an environment conducive to respect for humanitarian law, should a non-international armed conflict break out.

935 Practice has shown that, once a non-international armed conflict takes place in a State, the dissemination and teaching of humanitarian law, including common Article 3, can also be carried out by entities other than States Parties, such as the ICRC and non-governmental organizations.[898] The inclusion of legal advisers in the armed forces of States and non-State Parties also enhances respect for humanitarian law in such conflicts.[899] Similarly, as States are under an obligation to investigate war crimes and prosecute suspects,[900] they should include serious violations of common Article 3 within the list of war crimes contained in domestic legislation.

936 Raising awareness of humanitarian law among non-State armed groups, the training of their members in how to respect the law, and the imposition of disciplinary sanctions alongside criminal sanctions can play a crucial role in improving compliance with common Article 3 within such groups.[901]

937 Common Article 1 calls on States to respect and ensure respect for the Geneva Conventions in all circumstances. This wording covers the provisions applicable to both international and non-international armed conflicts.[902] Measures to 'ensure respect' for common Article 3 might include diplomatic pressure exerted by third States on Parties which violate common Article 3, the public denunciation of violations of common Article 3, and the taking of any other measures designed to ensure compliance with common Article 3.[903]

938 It follows from common Article 3, which is binding on all Parties to a non-international armed conflict, that non-State armed groups are obliged to 'respect' the guarantees contained therein.[904] Furthermore, such armed groups have to 'ensure respect' for common Article 3 by their members and by

[897] Traditionally, dissemination is carried out through orders, courses of instruction, or the issuance of manuals, but it can also take place by other means, such as drawings, pictures or comic books, and radio or television programmes; see Sivakumaran, 2012, pp. 433–434.

[898] One non-governmental organization which is particularly active in this field is Geneva Call; see Sivakumaran, 2012, pp. 434–436. See also UN Security Council, *Report of the Secretary-General on the protection of civilians in armed conflict*, UN Doc. S/2001/331, 30 March 2001, Recommendation 10, p. 11.

[899] See ICRC Study on Customary International Humanitarian Law (2005), Rule 141 and its commentary (Henckaerts/Doswald-Beck, pp. 500–501); Additional Protocol I, Article 82.

[900] See ICRC Study on Customary International Humanitarian Law (2005), Rule 158. Note also the preamble to the 1998 ICC Statute, which recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

[901] For more details, see Sassòli, 2010; La Rosa/Wuerzner; and Bellal/Casey-Maslen.

[902] For more details, see the commentary on common Article 1, para. 158.

[903] For a detailed discussion of measures available to States to ensure respect for the Conventions, see the commentary on common Article 1, paras 179, 183–184, and 214. See also Moir, pp. 245–250.

[904] For more details on the binding nature of common Article 3 on all Parties to a non-international armed conflict, see section D.1.b.

individuals or groups acting on their behalf.[905] This follows from the requirement for non-State armed groups to be organized and to have a responsible command which must ensure respect for humanitarian law. It is also part of customary international law.[906]

b. Monitoring compliance

939 Common Article 3 lacks machinery which could help to ensure compliance with its provisions by Parties to a non-international armed conflict.[907] The compliance mechanisms forming part of the Geneva Conventions, such as the institution of Protecting Powers[908] and the establishment of an enquiry procedure or a conciliation procedure,[909] are applicable only in international armed conflicts.[910] However, Parties to a non-international armed conflict may make special agreements in accordance with Article 3(3) to use these compliance mechanisms or others in non-international armed conflicts.[911]

940 The International Humanitarian Fact-Finding Commission (IHFFC), established in 1991 pursuant to Article 90 of Additional Protocol I, is competent to enquire into alleged grave breaches or other serious violations of the Geneva Conventions or Additional Protocol I. Its competence is constrained by the scope of application of Additional Protocol I.[912]

[905] See the commentary on common Article 1, para. 165. For some tools, see e.g. ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, and Sandesh Sivakumaran, 'Implementing humanitarian norms through non-State armed groups', in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, 2015, pp. 125–146.

[906] See ICRC Study on Customary International Humanitarian Law (2005), Rule 139 and commentary (Henckaerts/Doswald-Beck, pp. 497–498).

[907] See 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, Res. 1, Strengthening legal protection for victims of armed conflict.

[908] See the commentaries on Articles 8 and 10.

[909] See the commentaries on Articles 11 and 132.

[910] It may be argued that Article 132 (Enquiry procedure) could be used in the context of violations of common Article 3, as the text of Article 132 speaks of 'an enquiry . . . concerning any alleged violation of the Convention'.

[911] For further details on special agreements, see section K. For an example of Parties to a non-international armed conflict having considered an enquiry procedure at the relevant time, see Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia (1991), Article 12, cited in Sassòli/Bouvier/Quintin, pp. 1713–1717:

> 12. Request for an enquiry.
> 1. Should the ICRC be asked to institute an enquiry, it may use its good offices to set up a commission of enquiry outside the institution and in accordance with its principles.
> 2. The ICRC will take part in the establishment of such a commission only by virtue of a general agreement or an ad hoc agreement with all the parties concerned.

See also some unilateral declarations, such as the 'Deed of Commitment under Geneva Call for adherence to a total ban on anti-personnel mines and for cooperation in mine action', signed by more than 30 non-State armed groups, which provides in its Article 3 for monitoring and verification tools.

[912] See Bothe/Partsch/Solf, p. 543; Françoise J. Hampson, 'Fact-Finding and the International Fact-Finding Commission', in Hazel Fox and Michael A. Meyer (eds), *Armed Conflict and the New*

However, some authors have considered that the wording of Article 90(2)(c)(i) of the Protocol could encompass serious violations of common Article 3.[913] The Commission itself indicated 'its willingness to enquire into alleged violations of humanitarian law, including those arising in non-international armed conflicts, so long as all Parties to the conflict agree'.[914] All Parties to a non-international armed conflict would need to provide the IHFFC with their consent before an enquiry could take place. This has not occurred to date.[915]

941 Other organizations have been instrumental in enhancing compliance with humanitarian law in non-international armed conflicts. In particular, common Article 3 grants impartial humanitarian bodies, such as the ICRC, the right to offer their services to the Parties to such a conflict.[916] In pursuing its protection activities, the ICRC seeks to prevent violations of the law and to ensure that the Parties to a non-international armed conflict cease any violations that may occur.[917] In carrying out these activities, the ICRC focuses on a bilateral dialogue with each Party to the armed conflict with the aim of persuading those responsible for violations to change their behaviour and meet their obligations.[918] While engaging with all the Parties, the ICRC also issues public statements and appeals for respect for humanitarian law, provides training and capacity-building, and assists in the integration of humanitarian law into official, legal, educational and operational curricula.[919]

Law, Vol. II, *Effecting Compliance*, British Institute of International and Comparative Law, London, 1993, p. 76; Heike Spieker, 'International (Humanitarian) Fact-Finding Commission', version of March 2013, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, http://www.mpepil.com; and Pfanner, p. 299.

[913] See Sivakumaran, 2012, pp. 459–462; Luigi Condorelli, 'La Commission internationale humanitaire d'établissement des faits: un outil obsolète ou un moyen utile de mise en œuvre du droit international humanitaire?', *Revue internationale de la Croix-Rouge*, Vol. 83, No. 842, June 2001, pp. 393–406, at 401; and Aly Mokhtar, 'To Be or Not to Be: The International Humanitarian Fact-Finding Commission', *Italian Yearbook of International Law*, Vol. XII, 2002, pp. 69–94, at 90.

[914] International Humanitarian Fact-Finding Commission (IHFFC), *Report of the International Fact-Finding Commission 1991–1996*, Bern, 1996, p. 2. See also *Report on the work of the IHFFC on the Occasion of its 20th Anniversary*, Bern, 2011, pp. 15, 17, 19 and 28.

[915] See Sivakumaran, 2012, p. 461.

[916] For more details, see section J.

[917] This is done in furtherance of the ICRC's mandate as contained in Article 5(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, which states that the ICRC is mandated to work for the 'faithful application of international humanitarian law' and the 'understanding and dissemination of knowledge of international humanitarian law'. For a discussion of protection activities, see section J.5.b.

[918] This dialogue is, in principle, of a confidential nature. Except in strictly defined circumstances, it is not the ICRC's practice to publicly condemn authorities responsible for violations of humanitarian law; see 'Action by the ICRC in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400.

[919] For more details on the ICRC's engagement with armed groups, see e.g. ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, and Sivakumaran, 2012, pp. 467–472.

942 The work of other organizations, such as the United Nations, also contributes to greater respect for humanitarian law in non-international armed conflicts.[920] The Security Council has a long practice of calling upon Parties to non-international armed conflicts to respect humanitarian law, of condemning serious violations and of recalling the obligation to prosecute the perpetrators of such violations.[921] The Council sets up fact-finding missions to look into violations of humanitarian and human rights law in non-international armed conflicts, and it established the innovative monitoring and reporting mechanism on children and armed conflict under its resolution 1612 (2005).[922] UN human rights mechanisms also aim to ensure better respect for humanitarian law in non-international armed conflicts, in particular as they consider issues of humanitarian law in their special procedures mechanisms or set up commissions of enquiry in certain contexts.[923]

6. *The concept of belligerent reprisals in non-international armed conflicts*

943 Belligerent reprisals are measures taken in the context of an international armed conflict by one of the Parties to the conflict in response to a violation

[920] See, in general, David S. Weissbrodt, 'The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict', *Vanderbilt Journal of Transnational Law*, Vol. 21, 1988, pp. 313–365.

[921] For an overview of the work of the UN Security Council in this area since 1989, see La Haye, 2008, pp. 166–167. See also Sivakumaran, 2012, pp. 465–466, and Stephen M. Schwebel, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law', *New York University Journal of International Law and Politics*, Vol. 27, No. 4, 1995, pp. 731–759. As an example, the UN Security Council referred the situations of Darfur and Libya to the ICC.

[922] The UN Security Council has set up numerous fact-finding missions in Burundi, Darfur (Sudan), Rwanda, the former Yugoslavia and elsewhere. For information on the monitoring and reporting mechanism on grave violations against children in armed conflict, see https://childrenandarmedconflict.un.org/.

[923] See e.g. the request in Human Rights Council, Res. S-16/1, The current human rights situation in the Syrian Arab Republic in the context of recent events, 29 April 2011, pursuant to which the UN High Commissioner for Human Rights established a fact-finding mission to investigate alleged violations of international human rights and humanitarian law in Syria. See also Sivakumaran, 2012, p. 467; Daniel O'Donnell, 'Trends in the application of international humanitarian law by United Nations human rights mechanisms', *International Review of the Red Cross*, Vol. 38, Special Issue No. 324, September 1998, pp. 481–503; Theo C. van Boven, 'Reliance on norms of humanitarian law by United Nations' organs', in Astrid J.M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*: *Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991, pp. 495–513; and Fanny Martin, 'Le droit international humanitaire devant les organes de contrôle des droits de l'homme', *Droits fondamentaux*, No. 1, July–December 2001, pp. 119–148.

of humanitarian law by an adverse Party. Such measures aim to put an end to the violation and to induce the adverse Party to comply with the law. These measures would be contrary to international law if they were not taken by the injured State in response to an internationally wrongful act committed by a responsible State.[924] Where not prohibited by international law, the use of belligerent reprisals is subject to stringent conditions in international armed conflicts.[925]

944 Both common Article 3 and Additional Protocol II are silent on the issue of belligerent reprisals in non-international armed conflicts. In the view of the ICRC, there is insufficient evidence that the concept of belligerent reprisals in non-international armed conflicts ever materialized in international law.[926] Historically, the practice describing the purpose of reprisals and conditions for resorting to them refers only to inter-State relations.[927] During the negotiations on Additional Protocol II, a number of States thought that the very concept of reprisals had no place in non-international armed conflicts.[928] Extending the concept of belligerent reprisals to non-international armed conflicts might grant a legal status or legitimacy under international law to non-State armed groups,[929] and would also give such groups the right to take belligerent reprisals against the State, all of which States are reluctant to grant.[930] Many military manuals do not apply this concept to non-international armed conflicts, and define belligerent reprisals as a measure of enforcement by one State against another.[931] Furthermore, there does not seem to be recorded instances of actual resort to reprisals by States in non-international armed conflicts in the last 60 years.[932]

[924] For more details, See the commentary on Article 13, section E.
[925] See ICRC Study on Customary International Humanitarian Law (2005), Rule 145. For more details, See the commentary on Article 13, paras 1635–1636.
[926] See Henckaerts/Doswald-Beck, commentary on Rule 148, p. 527. This point of view is not shared by Sivakumaran, who cites the Spanish Civil War as an example where belligerents felt entitled to use belligerent reprisals; Sivakumaran, 2012, p. 449.
[927] See Henckaerts/Doswald-Beck, commentary on Rule 148, p. 527.
[928] See *ibid*. citing e.g. the statements made by Canada, Iran, Iraq, Mexico, Nigeria and the United States. For a full review of the preparatory work for Additional Protocol II on this issue, see Henckaerts/Doswald-Beck, commentary on Rule 148, pp. 528–529, and Bílková, pp. 44–47.
[929] See the statement of Germany during the negotiations which led to the adoption of Additional Protocol II: this term could give 'the Parties to a conflict the status under international law which they had no right to claim'; *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. VIII, p. 325, para. 11.
[930] Milanovic/Hadzi-Vidanovic, p. 273, and De Hemptinne, p. 588.
[931] See Henckaerts/Doswald-Beck, commentary on Rule 148, p. 528, citing e.g. the military manuals of Australia, Canada, Germany, the United Kingdom and the United States. See also Bílková, pp. 50–51.
[932] See Bílková, p. 49. This author argues, however, that 'the fact that States do not resort to reprisals in non-international armed conflict, or at least do not publicly claim to do so, does not necessarily mean that they are persuaded that they lack the right to do so'.

Acts of so-called 'reprisals' allegedly committed in non-international armed conflicts have been condemned, and the importance of protecting civilians and persons *hors de combat* has been stressed.[933] These considerations led the ICRC Study on Customary International Humanitarian Law to conclude that Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals under customary international law.[934]

945 Some authors believe, however, that belligerent reprisals are a tool open to Parties to a non-international armed conflict as a necessary consequence of the fact that such Parties are bound by the primary norms of humanitarian law.[935] Some ICTY Chambers have also looked at the issue whether the concept of reprisal was applicable in non-international armed conflicts.[936]

946 However, whichever view is taken, it is clear that common Article 3 prohibits violence to life and person, the taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment, and the denial of fair trial 'at any time and in any place whatsoever'. Any 'reprisal' that would entail these acts would therefore be prohibited.[937] Similarly, common Article 3 provides that all persons not or no longer taking active part in the hostilities must be treated humanely 'in all circumstances'. Any 'reprisal' that would be incompatible with the requirement of humane treatment would therefore be unlawful.[938]

[933] See Henckaerts/Doswald-Beck, commentary on Rule 148, p. 527 (citing examples in the context of conflicts in Chad, Colombia, the Democratic Republic of the Congo, Mali and Rwanda).

[934] See ICRC Study on Customary International Humanitarian Law (2005), Rule 148. See also De Hemptinne, pp. 587–591, and Shane Darcy, 'The Evolution of the Law of Belligerent Reprisals', *Military Law Review*, Vol. 175, March 2003, pp. 184–251, at 216–220.

[935] For details, see Bílková, pp. 31–65, and Sivakumaran, 2012, pp. 449–457. Bílková considers this right of reprisal not to be unlimited; see, in particular, pp. 40–41. Sivakumaran, p. 451, believes that the 'prohibition on the use of belligerent reprisals through common Article 3 has to be limited to the acts prohibited by that article'.

[936] It is interesting to note that the earlier findings by the ICTY in *Martić* Rule 61 Decision, 1996, paras 15–17, and in *Kupreškić* Trial Judgment, 2000, paras 527–536 – that, under customary law, reprisals against the civilian population were prohibited in all armed conflicts – were not followed by the *Martić* Trial and Appeals Chambers; see *Martić* Trial Judgment, 2007, paras 464–468, and Appeal Judgment, 2008, paras 263–267. Judges in those cases examined whether the shelling of Zagreb by the defendant could be considered a lawful reprisal. In so doing, it applied the conditions or limitations imposed on reprisals, usually recognized to be applicable in international armed conflicts, in a conflict of a non-international character, apparently rejecting therefore the conclusion reached in the *Kupreškić* Trial Chamber that reprisals against the civilian population are prohibited under customary law in all circumstances.

[937] See Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 40, and Henckaerts/Doswald-Beck, commentary on Rule 148, p. 526.

[938] *Ibid*. Similarly, Article 4 of Additional Protocol II allows no room for reprisals against persons not or no longer taking a direct part in hostilities; see Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 4530.

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